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Reform Commission

IMPROVING MANITOBA'S
PRESUMPTION OF DEATH ACT

Final Report

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The views expressed in this report are those of the Manitoba Law Reform Commission and do not necessarily represent the views of the individuals and organizations who have so generously assisted the Commission in this project.

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EXECUTIVE SUMMARY

Presumption of death legislation is not to be confused with survivorship or missing persons legislation. Survivorship legislation prescribes the order of death when two or more persons die at the same time or in circumstances in which the order of death cannot be determined. Missing persons legislation provides access to records for the purpose of searching for a missing person. In contrast to both of these types of legislation, presumption of death legislation allows courts to issue orders declaring someone to be presumed dead so that the estate of the missing person may be administered, insurance proceeds may be paid out, or a spouse may remarry. Manitoba has statutes which deal separately with survivorship, missing persons and presumption of death.

All Canadian jurisdictions have some form of presumption of death legislation regardless of whether or not the relevant legislative provisions are restricted, in their application, to specific statutory contexts, are laws of general application, or both. It would appear that the presumption of death legislation found in most other Canadian jurisdictions has been significantly amended since originally enacted. Conversely, Manitoba's *Presumption of Death Act* has not been amended since first enacted in 1968. The purpose of this Report is to recommend improvements to Manitoba's *Presumption of Death Act* in order to put it on par with presumption of death legislation found in other Canadian jurisdictions.

RÉSUMÉ

Les dispositions législatives sur les présomptions de décès ne doivent pas être confondues avec celles portant sur les présomptions de survie ou les personnes disparues. Les dispositions législatives sur les présomptions de survie prescrivent l'ordre des décès lorsque deux personnes ou plus meurent en même temps ou dans des circonstances qui ne permettent pas de déterminer l'ordre des décès. Les dispositions législatives sur les personnes disparues fournissent l'accès aux documents aux fins de recherche d'une personne disparue. Comparativement à ces deux types de dispositions législatives, les dispositions législatives portant sur les présomptions de décès permettent aux tribunaux de délivrer des ordonnances qui déclarent qu'une personne est présumée décédée pour que la succession de la personne disparue puisse être administrée, que le produit de l'assurance puisse être payé ou que le conjoint puisse se remarier. Le Manitoba dispose de lois qui régissent séparément les présomptions de survie, les personnes disparues et les présomptions de décès.

Toutes les administrations canadiennes ont une certaine forme de dispositions législatives sur les présomptions de décès, peu importe si les dispositions pertinentes sont restreintes, dans leur application, à certains contextes législatifs particuliers ou si elles sont des lois d'application générale, ou les deux. Il semble que les dispositions législatives sur les présomptions de décès que l'on retrouve dans la plupart des autres administrations canadiennes ont été grandement modifiées depuis qu'elles ont été adoptées. Par contre, la *Loi sur les présomptions de décès* du Manitoba n'a pas été modifiée depuis qu'elle a été adoptée pour la première fois en 1968. L'objectif du présent rapport est de recommander des améliorations à apporter à la *Loi sur les présomptions de décès* du Manitoba afin qu'elle corresponde aux dispositions législatives sur les présomptions de décès que l'on retrouve dans les autres administrations canadiennes.

CHAPTER 1: INTRODUCTION

At what point, and in what circumstances, should someone who cannot be located be presumed dead? Who should be charged with making this presumption? Who should be empowered to request a declaration of presumption of death order? Should different rules apply in having someone presumed dead in different circumstances? The answers to these questions have important legal, economic and social repercussions for those who remain behind, affecting, for example, whether or not and when someone might be entitled to survivorship benefits, such as those provided through insurance policies or pensions, inherit real property, or legally remarry.

All Canadian provinces and territories, including Manitoba, have chosen to regulate some or all of these matters by enacting presumption of death legislation of general application and/or enacting presumption of death provisions that apply in specific statutory contexts. It is important to note that presumption of death, in terms of its legal subject matter, is distinct from survivorship (the legal right of a person to inherit property when persons die simultaneously or when the order of death cannot be determined). It is also distinct from the rules governing state sanctioned efforts to locate missing persons. Presumption of death legislation enables an applicant to obtain a court order respecting a person who has been missing for some time in order for the estate of the person to be administered, for insurance proceeds to be paid, or for a spouse to remarry. Survivorship legislation, on the other hand, generally prescribes the order of death in circumstances where it cannot be determined, such a plane crash or other mass casualty situation, while missing persons legislation provides a framework governing how, when and in what circumstances certain state agents are able to obtain access to a missing person's personal records in order to assist them in searching for that person. Manitoba has three separate statutes to deal with each of these three areas of law: the *Survivorship Act*,¹ the *Missing Persons Act*² and the *Presumption of Death Act*.³ Manitoba also deals separately with presumption of death matters for the purposes of life insurance and accident and sickness insurance policies in the *Insurance Act*.⁴

Enacted in 1968, at or around the time that many other Canadian provinces and territories were enacting similar legislation, Manitoba's *Presumption of Death Act* has not been amended since coming into force. This Report considers whether changes to this statute may be required in light of comparable legislation in other jurisdictions in Canada and elsewhere, with reference to case law, where relevant.

British Columbia,⁵ Saskatchewan,⁶ Ontario,⁷ New Brunswick,⁸ Nova Scotia,⁹ Newfoundland and Labrador,¹⁰ the Yukon,¹¹ the Northwest Territories,¹² Nunavut¹³ and Quebec¹⁴ all have

¹ Originally S.M. 1982-83-84, c. 28; now C.C.S.M. c. S250.

² Originally S.M. 2012, c. 6; now C.C.S.M. c. M199.

³ Originally S.M. 1968, c. 48; C.C.S.M. c. P120. A copy of Manitoba's *Presumption of Death Act* is available at Appendix A to this report.

⁴ R.S.M. 1987, c. 140. (C.C.S.M. c. 140). Sections 180 and 186 to 191 of Manitoba's *Insurance Act* are available at Appendix C to this report.

⁵ See *Presumption of Death Act*, R.S.B.C. 1996, c. 444, available at Appendix D to this report.

⁶ See the *Missing Persons and Presumption of Death Act*, S.S. 2009, c. M-20.01, available at Appendix E to this report.

⁷ See the *Declaration of Death Act*, S.O. 2002, c. 14, available at Appendix F to this report.

presumption of death statutes that have general application, as do Scotland,¹⁵ Northern Ireland,¹⁶ and, most recently, England and Wales.¹⁷ Alberta,¹⁸ Prince Edward Island,¹⁹ New Zealand²⁰, and some of the Australian states²¹ provide for declaration of presumption of death orders in specific statutory contexts, but none of these jurisdictions have presumption of death statutes that apply generally. The presumption of death statutes of England and Wales, Northern Ireland, and Scotland are quite different from the Canadian presumption of death statutes, and for that reason, the Commission has largely ignored the United Kingdom legislation in preparing this report.

Chapter 2 of this report outlines the history and background which led up to the enactment of the *Presumption of Death Act* in Manitoba. Chapter 3 canvasses the need for reform with reference to legislation in other jurisdictions. Chapter 4 provides a summary of additional matters considered or reviewed by the Commission during its study of the Act, but about which it has made no recommendations. Chapter 5 of this report provides a summary of the Commission's recommendations.

⁸ See the *Presumption of Death Act*, S.N.B. 2012, c. 110, available at Appendix G to this report.

⁹ See the *Presumption of Death Act*, R.S.N.S. 1989, c. 354, available at Appendix H to this report.

¹⁰ See the *Presumption of Death Act*, R.S.N.L. 1990, c. P-20, available at Appendix I to this report.

¹¹ See the *Presumption of Death Act*, R.S.Y. 2002, c. 174, available at Appendix J to this report.

¹² See the *Presumption of Death Act*, R.S.N.W.T. 1988, c. P-9, available at Appendix K to this report.

¹³ See the *Presumption of Death Act*, R.S.N.W.T. 1988, c. P-9 (Nunavut), available at Appendix L to this report.

¹⁴ *Civil Code of Quebec*, L.R.Q., c. C-1991, art. 92 to 102, available at Appendix M to this report.

¹⁵ See the *Presumption of Death (Scotland) Act 1977* (U.K.), 1977, c. 27, available online at:

<http://www.legislation.gov.uk/ukpga/1977/27/contents>.

¹⁶ See the *Presumption of Death Act (Northern Ireland) 2009*, (U.K.), 2009, c. 6, available online at:

http://www.legislation.gov.uk/nia/2009/6/pdfs/nia_20090006_en.pdf.

¹⁷ See the *Presumption of Death Act 2013* (U.K.), 2013, c. 13, available online at:

<http://www.legislation.gov.uk/ukpga/2013/13/contents/enacted>.

¹⁸ See relevant excerpts from Alberta's *Vital Statistics Act*, S.A. 2007, v. C-4.1, *Surrogate Rules*, A.R. 130/95, *Marriage Act*, R.S.A. 2000, c. M-5 and *Insurance Act*, R.S.A. 2000, c. I-3, available at Appendix N to this report.

¹⁹ See relevant excerpts from Prince Edward Island's *Marriage Act*, R.S.P.E.I. 1988, c. M-3, *Probate Act*, R.S.P.E.I. 1988, c. P-21 and *Insurance Act*, R.S.P.E.I. 1988, c. I-4, available at Appendix O to this report.

²⁰ See, for example, sections 32 to 36 of the *Family Proceedings Act 1980* (NZ) which provides a framework for how to obtain a presumption of death order with respect to a missing person for the purposes of remarriage. This statute is available online at: <http://www.legislation.govt.nz/act/public/1980/0094/latest/whole.html>.

²¹ See, for example, section 7 of the *Administration and Probate Act 1958* (Vic), which allows for a grant of probate on evidence or presumption of death. This statute is available online at:

http://www.austlii.edu.au/au/legis/vic/consol_act/aapa1958259/.

CHAPTER 2: BACKGROUND AND HISTORY

1. The Common Law Rule on Presumption of Death

In Canada, as well as in other common law jurisdictions, courts have historically been the ones tasked with declaring, upon application, that a missing individual is now presumed dead. They did so in accordance with a common law rule developed by the courts of England. The common law rule regarding presumption of death provides:

where there is no acceptable affirmative evidence that a person was alive at some time during a continuous period of seven years or more and it is proved that there are persons who would be likely to have heard of him over that period, that those persons have not heard of him, and that all due inquiries have been made appropriate to the circumstances, [...] there arises a rebuttable presumption of law that he died sometime within that period.²²

In other words, if an applicant could satisfy the court that the missing individual in question had not been heard from for at least seven years; that there were persons likely to have heard from him/her during that period but these persons have not heard from him or her; and that sufficient inquiries had been made to locate the missing person, absent evidence to the contrary, the court would issue a declaration of presumption of death. By contrast, an applicant seeking a declaration of presumption of death with respect to an individual where he or she had been missing for less than seven years would not benefit from this presumption. In such cases, the applicant would instead have to satisfy the court, on a balance of probabilities, that the evidence surrounding a person's disappearance was more consistent with death than any other reasonable explanation for his or her absence.²³

Many Canadian jurisdictions, Manitoba included, have not been content to rely on the common law rule regarding the presumption of death, but have instead enacted one or more legislative frameworks to replace and/or augment the rule.

2. Manitoba's *Presumption of Death Act*

Manitoba's *Presumptive of Death Act* is a short statute. It gives the Manitoba Court of Queen's Bench²⁴ the authority to make an order, upon application, declaring a person to be presumed dead.²⁵ The court may make this order for all purposes or, alternatively, for such purposes as it specifies.²⁶ The court will only issue such an order if satisfied that:

²² Halsbury's Laws of England, Fourth Edition, Butterworths, London, 1976, Volume 17, p. 85. Also see, for example, *Chard v. Chard*, [1956] 3 All E.R. 721 at 728 (Probate Division); *Re Phene's Trusts* (1870), L.R. 5 Ch. App. 139; *Re McNeil* (1906), 12 O.L.R. 208 (Ont. H.C.J.); *Re Bell*, [1946] O.R. 854 (C.A.); *Darling v. Sun Life Assurance Company of Canada*, [1943] O.R. 26 (C.A.).

²³ See, for example, *Sheehy v. Robinson et al.*, [1947] O.W.N. 121 (Ont. H.C.J.) at p. 122; *Martin v. Prudential Insurance Company of America et al.* (1954), 11 W.W.R. (N.S.) 139 (B.C.C.A.).

²⁴ See *Presumption of Death Act*, *supra* note 3, section 1.

²⁵ *Ibid.* at section 2(1).

²⁶ *Ibid.*

- the applicant has not heard from the person with respect to whom the order is sought since a specified date and to the applicant's knowledge, no-one else has heard from him or her either;
- the applicant has no reason to believe that the person is alive; and
- there are reasonable grounds to believe that the person is dead.²⁷

While there is nothing in the statute specifically delineating the burden of proof and no Manitoba case law touching on this point, presumably the burden of proof is the civil standard; proof on a balance of probabilities.²⁸ There is nothing in the statute specifying that a person must be missing or absent for a specified period of time before an applicant can seek an order declaring the missing person to be presumed dead.

In addition to meeting the above test, before the court will issue an order declaring someone to be presumed dead, the applicant must provide notice that he or she is seeking this order. The Act specifies that, in the case of an order declaring someone presumed dead for all purposes, the court will not make this order unless the applicant has first published an advertisement in a general circulation newspaper for the area in which the missing person was last known to reside, stating that an application has been made to the court to declare that person presumed dead. No time limit for the running of the advertisement is provided by the Act. The court may also direct the applicant to notify other specified persons by other means.²⁹ In cases where an order declaring someone to be presumed dead is made for some, but not all, purposes, the court shall direct how and to whom appropriate notice of the application is to be given.³⁰

In terms of the content to the order, the *Presumption of Death Act* states that the order must provide the date on which the person is presumed to have died, or alternatively, the date after which he/she is presumed not to be living.³¹

Once the order has been made, the order, or a certified copy of the order, constitutes proof of death for the purposes for which the order has been made, except in the case of life insurance policies, in which case the rules regarding presumption of death found in Part V of the *Insurance Act* apply.³²

²⁷ *Ibid.*

²⁸ That this is the applicable standard of proof is supported by the fact that in 1972, when the Uniform Law Commission of Canada (ULCC) was considering amendments to its model Presumption of Death Act of 1960 (upon which Manitoba's *Presumption of Death Act* was closely modeled – see the discussion, *infra*, on pages 7 to 9 of this report), the ULCC considered and rejected the imposition of a criminal standard of proof to support an order declaring someone to be presumed dead, and described the standard of proof required in the Presumption of Death Act of 1960 as the civil standard. See the *Proceedings of the Fifty-Fourth Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada*, 1972, at p. 155. A copy of these proceedings is available on the ULCC's website at: http://www.ulcc.ca/images/stories/Past_Proceedings_PDF/1972ULCC0054.pdf. Also see *King's Crew Motor Cycle Club v. Manufacturers Life Insurance Co* (1990), 106 A.R. 82 (Q.B.) at paras. 7 – 8, in which the Alberta Court of Queen's Bench specifies the civil "balance of probabilities" standard as the standard of proof for an order for presumption of death in life insurance matters.

²⁹ *Ibid.* at section 2(3)(a).

³⁰ *Ibid.* at section 2(3)(b).

³¹ *Ibid.* at section 2(2).

³² *Presumption of Death Act*, *supra* note 3, sections 3(1) and 3(2).

A copy of Manitoba's *Presumption of Death Act* has been attached to this report as Appendix A.

3. Historical Origins of the *Presumption of Death Act*: The Uniform Law Conference of Canada's (ULCC's) *Presumption of Death Act* of 1960

In 1960, the Uniform Law Conference of Canada (ULCC) published a model statute respecting presumption of death, through which it hoped to encourage harmonization of provincial/territorial law in this area.³³ Manitoba's *Presumption of Death Act* closely mirrors the wording contained in the ULCC's *Presumption of Death Act* of 1960, a copy of which has been attached to this report in Appendix B.³⁴ There are, however, two significant differences. Firstly, the ULCC's *Presumption of Death Act* of 1960 specifies that an application for a declaration of presumption of death order will be heard "after such notice as the court deems proper,"³⁵ while Manitoba's *Presumption of Death Act* explicitly states that an order shall not be made unless notice of application for a declaration of presumption of death order has been given, and specifies at least some form of that notice (publication in a newspaper) in the event that the applicant is seeking a declaration of presumption of death order for all purposes.³⁶ The other significant difference is that the ULCC's *Presumption of Death Act* of 1960 held that a court order or a certified copy of a court order declaring someone to be presumed dead for all purposes, or for certain specified purposes, is proof of death in all matters for which the declaration was made.³⁷ By contrast, section 3(2) of Manitoba's *Presumption of Death Act* explicitly exempts life insurance policies from the reach of the Act, clarifying that, with respect to life insurance policies and presumption of death orders, the provisions contained in Part V of Manitoba's *Insurance Act* apply.

When Manitoba's *Presumption of Death Act* was first introduced in the Second Session of the 28th Legislature, 1968, as Bill S-7, it, like the ULCC's model statute of 1960, contained a provision stating that an order declaring someone presumed dead under the Act, or a certified copy of the order, was proof of death for all purposes. Presumably, "all purposes" included life

³³ The ULCC began its consideration of a model *Presumption of Death Act* in 1947. See the *Proceedings of the Twenty-Ninth Annual Meeting of the Conference of Commissioners for the Uniformity of Legislation in Canada*, p. 113. These proceedings are available online on the ULCC's website at:

http://www.ulcc.ca/images/stories/Past_Proceedings_PDF/1947ULCC0029.pdf. Consideration of model presumption of death legislation continued at the ULCC's Fortieth Annual Meeting held in 1958 (see p. 27 of the *Proceedings of the Fortieth Annual Meeting*, available on the ULCC's website at: http://www.ulcc.ca/images/stories/Past_Proceedings_PDF/1958ULCC0040.pdf), the Forty-First Annual Meeting held in 1959 (see pp. 26 and 114 – 115 of the *Proceedings of the Forty First Annual meeting*, available on the ULCC's website at: http://www.ulcc.ca/images/stories/Past_Proceedings_PDF/1959ULCC0041.pdf), and the Forty-Second Annual Meeting, held in 1960 (see pp. 30 and 111 to 115 of the *Proceedings of the Forty-Second Annual Meeting*, available on the ULCC's website at: http://www.ulcc.ca/images/stories/Past_Proceedings_PDF/1960ULCC0042.pdf).

³⁴ In addition to being available at Appendix B to this report, a copy of the ULCC's *Presumption of Death Act* of 1960 is also available on p. 115 of the *Proceedings of the Fort-Second Annual Meeting*, available on the ULCC's website at: http://www.ulcc.ca/images/stories/Past_Proceedings_PDF/1960ULCC0042.pdf.

³⁵ See section 3(1) of the ULCC's *Presumption of Death Act* of 1960, found at Appendix B.

³⁶ *Presumption of Death Act*, *supra* note 3, section 2(3).

³⁷ See section 4 of the ULCC's *Presumption of Death Act* of 1960, found at Appendix B.

insurance and remarriage purposes, although the versions of the *Marriage Act*³⁸ and the *Insurance Act*³⁹ in force at that time each contained their own procedures for having missing persons declared to be presumed dead. At the time Bill S-7 was introduced in the legislature, the Government of Manitoba⁴⁰ was of the view that no mandatory waiting period should be imposed for a declaration of presumption of death order, regardless of the legislative context (both the *Marriage Act* and the *Insurance Act* in force at that time required an applicant to wait 7 years before he/she could apply for a declaration of presumption of death order for the purposes of remarriage or collecting monies from a life insurance policy, respectively) and that courts should be empowered, in all circumstances, to consider what, if any, waiting period might be appropriate before a declaration of presumption of death order could be made. However, in Committee, prior to second reading, the then Attorney General, the Honourable Sterling Lyon (sponsor of the bill) proposed amendments that would exempt life insurance contracts from the ambit and operation of the *Presumption of Death Act*. These amendments passed despite opposition from some sources⁴¹ and notwithstanding a recommendation by the Law Reform Committee, the predecessor to this Commission, that Manitoba not only enact the model ULCC Act, but also follow the lead of British Columbia, which had, in its own presumption of death legislation, enacted a provision specifying that orders declaring a missing person to be presumed dead under its *Presumption of Death Act* would be effective as proof of death for all purposes, and had amended its own marriage and insurance legislation accordingly.⁴²

Oddly, or perhaps even contradictorily, section 2(1) of the *Presumption of Death Act* permits the court to make an order "for *all purposes* or for such purposes only as are specified in the order" [emphasis added], while section 3(2) explicitly exempts life insurance policies from the statute's reach.⁴³ Even more oddly, the *Presumption of Death Act* has never referenced the *Marriage Act*. Accordingly, in the case of a person who was seeking a court order declaring his/her missing spouse to be presumed dead, it was somewhat unclear, at least until amendments were made to the *Marriage Act* in 1983, as to whether the provisions of the *Presumption of Death Act* or the *Marriage Act* would prevail, or whether a person, having obtained an order declaring someone to be dead for all purposes under the *Presumption of Death Act* would still need to apply for a separate declaration of death under the *Marriage Act* before he or she could obtain a licence to remarry.

Section 25(1) of the version of the *Marriage Act* in force in 1968⁴⁴ had allowed an individual whose spouse had been absent for at least seven years to petition the Court of Queen's Bench for an order declaring the other party to the marriage to be presumed dead. It was necessary for an

³⁸ R.S.M. 1954, c. 154.

³⁹ The relevant provisions in the version of the *Insurance Act* in force in 1968 were section 176 to 180. In the current version of the Act, *supra* note 4, found at Appendix C to this report, the relevant provisions are sections 180 and 186 – 191. While the numbering of these provisions has changed, their wording has not. A fuller discussion of the current provisions in the *Insurance Act* dealing with presumption of death orders takes place later in this report.

⁴⁰ Manitoba, Legislative Assembly, *Debates and Proceedings*, Vol. XIV, No. 24, p. 614, Mr. Lyon.

⁴¹ *Ibid.*, Vol. XIV, No. 24, p. 613, No. 27, p. 664, No. 53, p. 1311, and No. 55, p. 1376.

⁴² Letter from R. H. Tallinn, Legislative Counsel, entitled *Re: Presumption of Death Act*, directed to the Honourable Sterling Lyon and dated 12 December 1967, Archives of Manitoba. At that time, British Columbia was the only jurisdiction in Canada to have enacted presumption of death legislation which specified that a declaration of death made under it was effective for all purposes. Ontario has since joined British Columbia in this regard.

⁴³ During debate this was pointed out, but to no avail, *supra* note 40, Vol. XIV, No. 53, p. 1312, Mr. Cherniack.

⁴⁴ See *supra* note 38.

individual whose spouse was missing to obtain such an order before he or she would be issued a licence to remarry. When the *Marriage Act* was re-enacted in 1983, the pertinent section⁴⁵ was changed to allow a spouse of a missing person to use an order issued under the *Presumption of Death Act* to obtain a licence to remarry, thus eliminating the need for an applicant to wait seven years before applying for an order declaring his/her missing spouse to be presumed dead.⁴⁶

Accordingly, it would appear that since 1983, the *Presumption of Death Act* dictates the process to be used in Manitoba to obtain a declaration of presumption of death order for all but life insurance purposes.⁴⁷ With respect to orders declaring a missing person to be dead for the purposes of a life insurance claim, the provisions currently found in sections 180 and 186 to 191 of the *Insurance Act*⁴⁸ apply. A copy of these sections of the *Insurance Act* may be found at Appendix C to this report.⁴⁹

4. Presumption of Death Rules Under the *Insurance Act*

With respect to life insurance, section 180 of the *Insurance Act* specifies that an insurer must, among other things, receive sufficient evidence of “the happening of the event upon which insurance money becomes payable,” before paying out a life insurance claim to a beneficiary or

⁴⁵ S.M. 1982-83-84, c. 57, s. 23, R.S.M. 1987, c. M50, s.23.

⁴⁶ The *Marriage Act* of Manitoba is similar to marriage legislation in British Columbia, Ontario, and the Yukon, in that an order declaring a missing person presumed dead obtained under presumption of death legislation constitutes proof of death and may be used as such for the purposes of obtaining a licence to remarry. See section 19 of the *Marriage Act*, R.S.B.C. 1996, c. 282; section 9 of the *Marriage Act*, R.S.O. 1990, c. M.3; and section 38 of the *Marriage Act*, R.S.Y. 2002, c. 146. Likewise, article 96 of the *Civil Code of Quebec*, *supra* note 14, found at Appendix M to this report, makes it clear that a declaratory judgment of death issued under article 92 of the Code has the effect of dissolving the marriage or civil union of the deceased person, leaving the surviving spouse free to remarry. The marriage legislation of Alberta, Saskatchewan, Prince Edward Island, the Northwest Territories and Nunavut require a discrete presumption of death order for the purposes of obtaining a licence to remarry, based, in most cases, upon an absence of seven years. See section 21 of the *Marriage Act*, R.S.A. 2001, c. M-5; section 24 of the *Marriage Act*, 1995, S.S. 1995, c. M-4.1; section 21 of the *Marriage Act*, R.S.P.E.I. 1988, c. M-3; section 41 of the *Marriage Act*, R.S.N.W.T. c. M-4; and section 41 of the *Marriage Act*, R.S.N.W.T. 1998, c. M-4 (Nunavut). The marriage statutes of New Brunswick, Nova Scotia, and Newfoundland and Labrador contain no provisions regarding presumption of death. See the *Marriage Act*, R.S.N.B. 2011, c. 188; the *Solemnization of Marriage Act*, R.S.N.S. 1989, c. 436; and the *Marriage Act*, S.N.L. 2009, c. M-1.02.

⁴⁷ As will be discussed a bit later in this report, sections 230.4 to 230.9 of the *Insurance Act* contain specific provisions on how to obtain a declaration of presumption of death order in the case of insurance claims made under accident or sickness insurance policies where a claimant is seeking the payout of accidental death benefits. These provisions would likely trump those found in Manitoba's *Presumption of Death Act*, by virtue of operation of the principles of statutory interpretation, if someone were seeking a declaration of presumption of death order for this specific purpose. Accordingly, it could be argued that sections 230.4 to 230.9 of the *Insurance Act* constitute another legislative exception to the *Presumption of Death Act*.

⁴⁸ These provisions are found in Part V of the *Insurance Act*, the part that deals specifically with life insurance policies.

⁴⁹ Interestingly enough, a review of recent Canadian case law on presumption of death orders reveals that the majority of cases dealing with this topic are those where someone is seeking to have a missing person presumed dead in order to collect on the missing person's life insurance policy (see, for example, *Antonation et al. v. Sylvester et al.*, 2006 MBQB 217, aff'd 2007 MBCA 110; *Comey Estate*, 2010 ABQB 343; *Re Cyr*, 2006 BCSC 1523; *Re Verin Blanchard Ricky Burgess*, 2004 BCSC 62; *Schmidt, Re* (1987), 12 B.C.L.R. (2d) 186 (B.C.C.A.)). Accordingly, it would seem that if life insurance matters are expressly exempted from the ambit of general presumption of death legislation, the presumption of death statutes of general application become less relevant.

other claimant. This means that, in the case of a life insurance policy that becomes payable upon someone's death, the claimant would need to provide the insurer with sufficient evidence that the person whose life was insured is, in fact, dead.

Where there is a dispute over whether or not the evidence provided by the claimant constitutes sufficient proof of the insured person's death, section 186 of the *Insurance Act* allows either the insurer or the claimant to apply to the Manitoba Court of Queen's Bench for a declaration as to the sufficiency of the proof of death provided by the claimant.⁵⁰ This application may be made either before or after the filing of an action (lawsuit) with respect to a life insurance claim. Bringing this application constitutes a stay with respect to any cause of action, unless the court orders otherwise.⁵¹ The applicant must provide thirty days' notice of the application. Upon hearing the application, the court may rule that there is sufficient evidence of death, in which case the insurer may be required, under sections 180 and 188(1) of the Act, to pay out the claim. Alternatively, the court may rule that there is insufficient evidence of death and direct what further evidence the claimant must provide in order to constitute sufficient proof of death. It may also order the publication of advertisements, order further inquiries to be made or make an order respecting costs.⁵² Alternatively the court may order that the matter of sufficiency of proof of death be decided in an action that has already been brought or is to be brought.⁵³ In special circumstances, the court may decide that, notwithstanding the fact that it had initially declared the evidence of proof of death to be insufficient and directed the claimant to provide further evidence, there is no need for the claimant to provide additional evidence as proof of death. In those circumstances, the court may declare that there is sufficient proof of death, in which case the insurer may be required, under sections 180 and 188(1) of the Act, to pay out the claim.⁵⁴

Rather than applying for a declaration of sufficiency of proof of death, a declaration which may be sought, it appears, any time after a life insurance claim has been made, the insurer or the claimant may, under section 187(1) of the *Insurance Act*, apply to the Manitoba Court of Queen's Bench for a declaration of presumption of death. Such an application may only be made, however, in circumstances where the claimant alleges that the insured person should be presumed dead by reason of his not having been heard of for seven years.

As in the case of an application for a declaration of sufficiency of proof of death, an application for a declaration of presumption of death may be brought either before or after the commencement of a cause of action with respect to the insurance claim and constitutes a stay of such an action, unless a court order otherwise. Applicants must provide thirty days' notice of such applications. If a court finds that the presumption of death has not been established (i.e. decides that there is insufficient evidence that the insured person has not been heard of in seven years), it may make any order it considers just with respect to further evidence to be provided by the claimant, order the publication of advertisements or order further inquiries to be made. It

⁵⁰ See sections 1(1) and 180 of the *Insurance Act*, *supra* note 4.

⁵¹ See section 189 of the *Insurance Act*, *supra* note 4.

⁵² See sections 186 and 191 of the *Insurance Act*, *supra* note 4.

⁵³ *Ibid.*

⁵⁴ See section 186 of the *Insurance Act*, *supra* note 4.

may also make an order respecting costs or an order directing this matter be decided in a cause of action, rather than through the application.⁵⁵

In making a declaration of presumption of death, section 187(2) of the *Insurance Act* specifies that the declaration must contain the full name of the person presumed dead, including his/her married or maiden name, if applicable, the gender of the individual in question, the date and place where death is presumed to have occurred and whether or not the presumed death was accidental, to the extent that all of the above-mentioned items have been established to the satisfaction of the court.

From the above analysis, it becomes clear that the key difference between a declaration of sufficiency of proof of death made under section 186 of the Act and a declaration of presumption of death made under section 187 of the Act is the point at which the application for each type of declaration can be made. An application for a declaration of sufficiency of proof of death may be made at any time after a claim under a life insurance policy has been made. By contrast, an application for a declaration as to the presumption of death may only be made in circumstances where the claimant alleges that the insured has not been heard from for at least 7 years. Notwithstanding this difference, however, both declarations have the same practical effect, at least as they pertain to the payment of life insurance claims: the making of either declaration allows for payment of a claim. Section 188(1) of the *Insurance Act* specifies that, upon making a declaration under section 186 or 187:

188(1) On making a declaration under section 186 or 187, the court may make any order respecting the payment of the insurance money and respecting costs that it considers just and a declaration, direction or order made under this subsection is binding on the applicant and on all persons to whom notice of the application has been given.

Further, if the court orders the pay out of insurance money under section 188(1), section 188(2) of the *Insurance Act* specifies that the payout order has the effect of discharging the insurer from financial liability to the extent of the amount paid.

It is also interesting to note that Part VI of Manitoba's *Insurance Act*, which deals with accident and sickness insurance, contains legislative provisions that are similar to those found in sections 180 and 186 to 191 of the *Insurance Act*. The relevant provisions, found at sections 230.4 to 230.9 of the *Insurance Act*, pertain to the payment of accidental death benefit claims made under accident or sickness insurance policies.⁵⁶ However, given that Part VI of the *Insurance Act* is not specifically exempted from the legislative ambit of the *Presumption of Death Act*, it is somewhat unclear whether someone seeking a declaration of presumption of death order so that he/she could collect accidental death benefits under an accident or sickness insurance policy would need to do so under sections 230.4 to 230.9 of the *Insurance Act*, the *Presumption of Death Act* or both. Presumably, using the rules of statutory interpretation, the more specific provisions regarding presumption of death found at sections 230.4 to 230.9 of the *Insurance Act* would be

⁵⁵ See section 187(1) and 191 of the *Insurance Act*.

⁵⁶ See sections 230.4 to 230.9 of the *Insurance Act*, *supra* note 4.

the ones that apply,⁵⁷ but this is not made explicit in either the *Presumption of Death Act* or the *Insurance Act*.

With the exception of British Columbia, Ontario, and Quebec,⁵⁸ all other Canadian provinces that have presumption of death legislation of general application carve out an express exemption for life insurance policies. Curiously, however, the presumption of death statutes of the Yukon,⁵⁹ the Northwest Territories,⁶⁰ and Nunavut do not.⁶¹ Having said this, because each territory's insurance legislation contains specific provisions to be followed to obtain a declaration of presumption of death order in life insurance matters,⁶² an exception has likely been created in a *de facto* manner by virtue of the operation of principles of statutory interpretation, just as is likely the case with respect to Manitoba's *Presumption of Death Act* and orders declaring someone to be presumed dead for the purposes of claiming accidental death benefits under Part VI of the *Insurance Act*. Accordingly, pursuant to the insurance legislation of all the provinces and territories, except British Columbia, Ontario and Quebec, there is a seven year waiting period before one can obtain a declaration of presumption of death order in respect of a life insurance policy.

5. The Uniform Law Conference of Canada's (ULCC's) Uniform Presumption of Death Act (1976)

Following the Uniform Law Conference of Canada's (ULCC's) promulgation of the Presumption of Death Act of 1960, the ULCC continued its study of issues related to the presumption of death at its Annual Meetings held from 1971 to 1976.⁶³ The Conference

⁵⁷ For a recent case dealing with the rule that, in the case of a conflict of statutes, the more specific statute is generally viewed by courts as trumping the more general one, please see *Lévis (City) v. Fraternité des policiers de Lévis*, 2007 SCC 14 at para. 58. Also see Côté, Pierre-André, *The Interpretation of Legislation in Canada*, 3rd ed. Scarborough, Ont.: Carswell, 2000 at pp. 358 – 362.

⁵⁸ See section 3 of the *Presumption of Death Act*, *supra* note 5, which may be found at Appendix D to this report and section 80 of the *Insurance Act*, R.S.B.C. 2012, c. 1, which may be found at Appendix P to this report. Also see section 2 of the *Declaration of Death Act*, *supra* note 7, which may be found at Appendix F to this report, and sections 203, 208 and 209 of the *Insurance Act*, R.S.O. 1990, c. I.8, which may be found at Appendix P to this report. Finally, see articles 92 to 102 of the *Civil Code of Quebec*, *supra* note 14, which may be found at Appendix M to this report.

⁵⁹ See section 2 of the *Presumption of Death Act*, *supra* note 11, found at Appendix J to this report.

⁶⁰ See section 2 of the *Presumption of Death Act*, *supra* note 12, found at Appendix K to this report.

⁶¹ See section 2 of the *Presumption of Death Act*, *supra* note 13, found at Appendix M to this report.

⁶² See sections 109 and 114 to 119 of the *Insurance Act*, R.S.Y. 2002, c. 119; sections 102 and 107 to 112 of the *Insurance Act*, R.S.N.W.T. 1988, c. I-4; and sections 102 and 107 to 112 of the *Insurance Act*, R.S.N.W.T. 1988, c. I-4 (Nunavut).

⁶³ See the *Proceedings of the Fifty-Third Annual Meeting of the Conference of Commissioners for the Uniformity of Legislation in Canada*, 1971, pp. 79 and 218-221, available on the ULCC's website at:

http://www.ulcc.ca/images/stories/Past_Proceedings_PDF/1971ULCC0053.pdf. Also see the *Proceedings of the Fifty-Fourth Annual Meeting*, 1972, pp. 32 – 33, 37 – 38 and 154 – 160, available on the ULCC's website at: http://www.ulcc.ca/images/stories/Past_Proceedings_PDF/1972ULCC0054.pdf; the *Proceedings of the Fifth-Fifth Annual Meeting*, 1973, p. 30, available on the ULCC's website at: http://www.ulcc.ca/images/stories/Past_Proceedings_PDF/1973ULCC0055.pdf; the *Proceedings of the Fifty-Sixth Annual Meeting*, 1974, pp. 35 and 215 – 220, available on the ULCC's website at: http://www.ulcc.ca/images/stories/Past_Proceedings_PDF/1974ULCC0056.pdf; the *Proceedings of the Fifty-Seventh Annual Meeting*, 1975, pp. 33, 44 and 77, available on the ULCC's website at

Commissioners came up with several ideas to further improve or revise the 1960 model statute, and, in 1976, they adopted a revised presumption of death model statute entitled the Uniform Presumption of Death Act (1976).⁶⁴

The Presumption of Death Act of 1960 and the Uniform Presumption of Death Act (1976) differ in three key aspects. Firstly, the 1960 model statute is silent with respect to who may apply to the court for an order declaring someone to be presumed dead, whereas the 1976 model statute specifies that an “interested person” may apply and provides a definition of who constitutes an interested person.⁶⁵ Secondly, ULCC’s Presumption of Death Act of 1960 contains no provisions to assist the court in determining property rights in circumstances where someone who has been presumed dead by court order later turns out to be alive. It also provides no statutory protection from liability to personal representatives who have been charged with distributing the property of individuals subject to declaration of presumption of death orders. By contrast, the Uniform Presumption of Death Act (1976) contains provisions outlining the duties of a personal representative of an individual who has been declared to be presumed dead by court order when the representative has reasonable grounds to believe that the person is not, in fact dead.⁶⁶ It also contains provisions detailing how distribution of property is to be carried out in cases where someone who has been presumed dead turns out to be alive,⁶⁷ or alternatively, is found to be dead, but died after the time he or she was presumed dead pursuant to court order.⁶⁸ These provisions give personal representatives at least some degree of statutory protection from liability when they distribute property in good faith reliance upon an order declaring someone to be presumed dead. Thirdly, the Presumption of Death Act of 1960 is silent with respect to who can appeal a presumption of death order or whether there is even a right of appeal available, whereas the Uniform Presumption of Death Act (1976) allows for an appeal from a declaration of presumption of death order and specifies that “any interested person” may apply for such an order.⁶⁹

No comparable amendments to those found in the Uniform Presumption of Death Act (1976) have been made to Manitoba’s *Presumption of Death Act*. As stated previously in this report, Manitoba’s *Presumption of Death Act* has remained unchanged since originally enacted in 1968. By contrast, many of the amendments found in the Uniform Presumption of Death Act (1976) have been adopted in other Canadian jurisdictions.⁷⁰ Indeed, some jurisdictions have gone much farther than the ULCC’s 1976 model statute in terms of providing specificity in their legislative

http://www.ulcc.ca/images/stories/Past_Proceedings_PDF/1975ULCC0057.pdf; and the *Proceedings of the Fifty-Eighth Annual Meeting*, 1976, pp. 32, 47, 57 and 225 – 226, available on the ULCC’s website at:

http://www.ulcc.ca/images/stories/Past_Proceedings_PDF/1976ULCC0058.pdf.

⁶⁴ A copy of the Uniform Presumption of Death Act (1976) is available on the ULCC’s website at:

<http://www.ulcc.ca/en/home/512-josetta-1-en-gb/uniform-actsa/presumption-of-death-act/622-presumption-of-death-act>. It may also be found at Appendix B to this report.

⁶⁵ *Ibid.* at section 1.

⁶⁶ *Ibid.* at section 3.

⁶⁷ *Ibid.* at section 4.

⁶⁸ *Ibid.* at section 5.

⁶⁹ *Ibid.* at section 6.

⁷⁰ The one exception seems to be Newfoundland and Labrador. Its *Presumption of Death Act*, *supra* note 10, available at Appendix I to this report, has not been amended since originally enacted in 1970. Like Manitoba’s *Presumption of Death Act*, *supra* note 3, available at Appendix A, the Newfoundland statute closely mirrors the ULCC’s Presumption of Death Act of 1960.

frameworks with respect to the issuance of declaration of presumption of death orders. Such specificity does, however, come with a cost – it removes some of the court’s discretion to issue and tailor a declaration of presumption of death order to fit the specific circumstances of the case before it.

CHAPTER 3: THE NEED FOR REFORM

For such an apparently simple matter, there is amazing diversity of provisions among the presumption of death statutes enacted by Canada's provinces and territories. Notwithstanding this diversity, however, what becomes immediately obvious from a perusal of the legislation of the other jurisdictions is that Manitoba's *Presumption of Death Act* is one of the least satisfactory of these statutes. The Act fails to provide those applying for declaration of presumption of death orders, persons charged with administering the estates or distributing the property of those subject to these orders, those who might have reason to object to a declaration of presumption of death order, or those who, following the issuance of an order declaring them to be dead, turn out to be, in fact, alive, sufficient certainty as to their rights and obligations in this area of the law. In the Commission's opinion, several amendments to the Act should be considered in order to put Manitoba's presumption of death legislation on par with comparable legislation in other Canadian jurisdictions.

1. Who Can Apply for a Declaration of Presumption of Death Order?

Manitoba's *Presumption of Death Act* is silent regarding who is entitled to apply for an order declaring someone to be presumed dead. The Act merely states that the court may make such an order "upon application."⁷¹ While Manitoba is not the only jurisdiction to be silent on this point – the presumption of death statutes of New Brunswick,⁷² and Newfoundland and Labrador⁷³ also provide no specifics on who may apply for a presumption of death order – the ULCC's Uniform Presumption of Death Act (1976) and the presumption of death legislation of all other jurisdictions specify that an application may be made by an "interested person." In addition, with the exception of the Quebec legislation, which refers to an "interested person" but does not define it, all of these statutes also define the term "interested person" more or less.

The ULCC 1976 model statute defines "interested person" as "any person who is or would be affected by" a presumption of death order. It further specifies that an "interested person" includes the "next of kin of the person in respect of whom an order is made or applied for" and "[a] person who holds property of the person in respect of whom an order is made or applied for."⁷⁴ The same definition of "interested person" is used in the presumption of death legislation in British Columbia,⁷⁵ the Yukon,⁷⁶ the Northwest Territories⁷⁷ and Nunavut.⁷⁸ The definition of "interested person" in Nova Scotia's *Presumption of Death Act* is very similar to the definitions

⁷¹ See section 2(1) of Manitoba's *Presumption of Death Act*, *supra* note 3, available at Appendix A.

⁷² See section 2(1) of New Brunswick's *Presumption of Death Act*, *supra* note 8, available at Appendix G.

⁷³ See section 3(3) of Newfoundland and Labrador's *Presumption of Death Act*, *supra* note 10, available at Appendix I.

⁷⁴ For the precise statutory language used, see section 1(b) of the ULCC's Uniform Presumption of Death Act (1976), *supra* note 64, found at Appendix B.

⁷⁵ See section 1 of British Columbia's *Presumption of Death Act*, *supra* note 5, available at Appendix D.

⁷⁶ See section 1 of the Yukon's *Presumption of Death Act*, *supra* note 11, available at Appendix J.

⁷⁷ See section 1 of the Northwest Territories' *Presumption of Death Act*, *supra* note 12, available at Appendix K.

⁷⁸ See section 1 of Nunavut's *Presumption of Death Act*, *supra* note 13, available at Appendix L.

contained in the above statutes, but Nova Scotia's statute also specifically includes the Public Trustee as an interested person.⁷⁹

The presumption of death statutes of Saskatchewan and Ontario contain more complex definitions of who may apply for a presumption of death order. Saskatchewan's *Missing Persons and Presumption of Death Act* allows certain specified persons, including the spouse, child, parent or legal guardian, sibling, grandchild, great-grandchild, grandparent, nephew, niece, uncle or aunt, as well as the Public Guardian and Trustee, and "any other person, who, in the opinion of the court, has sufficient interest in the estate" to apply for an order declaring a missing person to be presumed dead.⁸⁰ The Saskatchewan statute further imposes an order of priority in terms of who can apply. Ontario's *Declaration of Death Act* allows an "interested person" to apply for an order declaring a missing person presumed dead, and, like the ULCC's 1976 model statute and the presumption of death statutes of British Columbia, the Yukon, the Northwest Territories, Nunavut and Nova Scotia, defines "interested person" to include any person who is or would be affected" by a presumption of death order. However, Ontario's *Declaration of Death Act* then goes on to specify that an "interested person" includes an executor or administrator of the missing person's estate, his/her spouse, his/her next of kin, his/her "guardian or attorney for personal care or property under the *Substitute Decisions Act* 1992," an insurer or claimant under the person's life insurance policy, and the committee of an individual's estate under the *Absentees Act*.⁸¹

The Commission is of the view that some guidance should be provided, both to the court and to the public as to who may apply for a declaration of presumption of death order. Accordingly, the Commission believes that Manitoba's *Presumption of Death Act* should be amended to specify that only an "interested person" may apply for such an order. The Act should also be amended to supply a definition of who constitutes an "interested person" for such purposes. This definition should be broad enough to ensure that anyone who could be affected by a declaration of presumption of death order is entitled to apply for one, but specific enough to avoid the danger of frivolous applications for such orders to the Court of Queen's Bench. It should also provide the court with some criteria to guide it in deciding, as a preliminary matter, whether or not to allow an application for an order declaring someone to be presumed dead to proceed.

The Commission believes that the presumption of death statutes of Saskatchewan and Ontario, both of which provide lists of examples of who may apply for declaration of presumption of death orders, may be too specific, unduly limiting the court in terms of granting such orders. Further, the Commission does not see the need or benefit of the order of priority in terms of who may apply, which is uniquely included in the Saskatchewan legislation. The more general definitions of "interested person" found in the ULCC 1976 model statute, and the presumption of death statutes of British Columbia, the Yukon, the Northwest Territories and Nunavut are, in our view, generally sufficient to prescribe who should be able to apply for such an order. Having said this, however, in the case of a missing person who has, for example, presumably died, but is intestate with no easily discernible next of kin and no-one able to act on his or her behalf, it may

⁷⁹ See section 2(b) of Nova Scotia's *Presumption of Death Act*, *supra* note 9, available at Appendix H.

⁸⁰ See sections 15(1) and 3(1) of Saskatchewan's *Missing Persons and Presumption of Death Act*, *supra* note 6, available at Appendix E.

⁸¹ See section 1 of Ontario's *Declaration of Death Act*, *supra* note 7, available at Appendix F.

be desirable to have the Public Guardian and Trustee specifically included as an “interested person” under the Act. By doing so, the Act would provide a mechanism for the Public Guardian and Trustee to obtain a declaration of presumption of death, and for the court to appoint the Public Guardian and Trustee to administer the missing person’s estate and distribute his or her assets (the Public Guardian and Trustee can only be appointed to administer a deceased’s estate where individual in question has already been determined to be dead). Accordingly, the Commission believes that, out of an abundance of caution, and as has been done in Nova Scotia’s *Presumption of Death Act*, the Public Guardian and Trustee should be included in the list of those who are “interested persons” for the purposes of applying for a declaration of presumption of death order. The Public Guardian and Trustee of Manitoba indicated, in response to the Commission’s Consultation Report on the *Presumption of Death Act*, that he “support[s] the proposal to include the Public Guardian and Trustee as an interested person”⁸² and:

[...] would anticipate that the Public Guardian And Trustee would seek Orders under this legislation in circumstances where the Public Guardian and Trustee acts for a minor or an adult party under a disability who would have an interest in the estate of an individual believed to have died.⁸³

Out of the same abundance of caution, and after considering the submission received from the Great-West Life Assurance Company in response to the Commission’s Consultation Report,⁸⁴ the Commission also believes it would be advisable to specifically include an insurer under the definition of “interested person” in the Act, as has been done in section 1 of Ontario’s *Declaration of Death Act*.⁸⁵ This amendment should clarify that an insurer, in this context, is a person or entity that has undertaken, through contract, to ensure an individual’s life.⁸⁶

⁸² Letter entitled *Re: Consultation Report on the Presumption of Death Act*, Douglas R. Brown, Public Guardian and Trustee of Manitoba, Office of the Public Guardian and Trustee of Manitoba, 08 September 2015.

⁸³ *Ibid.*

⁸⁴ Letter entitled *Re: Great-West Life Assurance Company's Response to Comment on the August 2015 Consultation Report: Improving Manitoba's Presumption of Death Act*, Gary Senft, Vice President and Associate General Counsel, Public Policy and Regulatory Affairs, Great-West Life Assurance Company, 06 October 2015. In this letter, Mr. Senft suggested that the *Presumption of Death Act* be amended to ensure that insurers be added to the list of those who are notified when someone is seeking a presumption of death order, in a similar manner to what has been done in section 2(2) of Ontario’s *Declaration of Death Act*, *supra* note 7, available at Appendix F to this report. While the topic of notice is specifically discussed in the next section of the report, the Commission believes that the most efficient way to guarantee that entities that have insured a person’s life receive notice of an application for a declaration of presumption of death order in relation to the insured is to add insurers to the definition of “interested person” under Manitoba’s *Presumption of Death Act*. This amendment would also give insurers the right to apply for declaration of presumption of death orders under the Act.

⁸⁵ See part (g) of the definition of “interested person” found in section 1 of Ontario’s *Declaration of Death Act*, *supra* note 7, available at Appendix F.

⁸⁶ *Ibid.*

Recommendation #1

Section 1 of Manitoba's Presumption of Death Act should be amended to add a definition of "interested person." The definition of "interested person" should be the same as the one found at section 1 of the Uniform Law Conference of Canada's Uniform Presumption of Death Act (1976), with the exception being that "(iii) the Public Guardian and Trustee" and "(iv) where there is a contract insuring an individual's life, an insurer" should be added to the list of those included as an "interested person."

Recommendation #2

Section 2(1) of Manitoba's Presumption of Death Act should be amended to specify that an application for an order declaring someone to be presumed dead may only be made by an "interested person."

2. Notice of an Application for a Declaration of Presumption of Death Order

As discussed previously in this report, Manitoba's *Presumption of Death Act* requires that notice of an application for a declaration of presumption of death order be provided before the court will make the order. However, the current provision is awkwardly worded, and its positioning relative to the other statutory provisions is somewhat problematic. Section 2(3) of the Act states:

2(3) An order [declaring someone to be presumed dead] shall not be made under this Act unless

(a) in the case of an order declaring that a person shall be presumed dead for all purposes, notice of the application has been given by publication of an advertisement in a newspaper having general circulation in the area in which the person was last known to reside, and in such other manner and to such persons as the court to which the application is made may direct; and

(b) in the case of any other order, notice of the application has been given in such manner and to such persons as the court to which the application is made may direct.

As is apparent from reading this provision, the statutory language, rather than putting a direct, positive obligation on an applicant to provide notice of an application, is couched in negative terms, stating that a court may not make an order declaring someone to be presumed dead unless "notice of an application has been given." The statutory language also explicitly fails to indicate who is responsible for providing the requisite notice, although most probably, it would be the applicant. Finally, the requirement that notice of an application for an declaration of presumption of death order be published in a newspaper when the order is being sought for all purposes is unique to Manitoba's legislation and seems somewhat unnecessary, given that that section 2(3) of the *Presumption of Death Act* already empowers the court to direct that notice be

provided in any manner and to any persons that the court deems necessary. The court's power over the form of notice is accordingly broad enough to allow the court to order an applicant to have notice of his/her application published in a newspaper, should the court deem this the most effective way for notice to be given.

In addition, the placement of the notice provision in the statute is peculiar, since section 2(3) of the *Presumption of Death Act*, the provision governing notice, comes after section 2(1), the provision which empowers the court to make a declaration of presumption of death order, provided certain other conditions are met. It is unclear to the Commission why the choice was made to position the notice section after the section governing the issuance of the order, given that the provision of notice of an application for an order is a precondition to the issuance of the order. In the Commission's view, it would make more sense to include any requirements with respect to provision of notice in section 2(1) of the Act, where all of the other preconditions to the issuance of the order are located.

A review of the presumption of death legislation in other Canadian jurisdictions reveals that several statutes are completely silent with respect to the provision of notice.⁸⁷ Other presumption of death statutes require notice to be provided to "any other interested persons of whom the applicant is aware,"⁸⁸ or after such notice as the court "considers proper"⁸⁹ or "thinks appropriate."⁹⁰

In terms of Canadian jurisdictions with less general notice provisions, Saskatchewan's *Missing Persons and Presumption of Death Act* is quite specific regarding the persons to whom notice must be given, depending upon who is making the application. Saskatchewan's statute also empowers the Court to provide notice to "any other person that the court considers necessary."⁹¹ Interestingly enough, Ontario's legislation, which requires notice to be provided to "any other interested persons of whom the applicant is aware," contains specific requirements regarding when and how notice to be provided in circumstances where one of the "interested persons" is an insurer.⁹² Finally, Nova Scotia's *Presumption of Death Act* only specifically requires notice of application to be provided to the Public Trustee.⁹³

Given our recommendation that Manitoba's *Presumption of Death Act* be amended to include a definition of an "interested person," and our recommendation to restrict applications for declaration of presumption of death orders to interested persons, the Commission believes that the *Presumption of Death Act* should be amended to specify that notice of an application for such

⁸⁷ See, for example, British Columbia's *Presumption of Death Act*, *supra* note 5, found at Appendix D; the Yukon's *Presumption of Death Act*, *supra* note 11, found at Appendix J; the Northwest Territories' *Presumption of Death Act*, *supra* note 12, found at Appendix K; Nunavut's *Presumption of Death Act*, *supra* note 13, found at Appendix L; and articles 92 to 102 of the *Civil Code of Quebec*, L.R.Q., c. C-1991, *supra* note 14, found at Appendix M.

⁸⁸ See section 2(1) of Ontario's *Declaration of Death Act*, *supra* note 7, found at Appendix F.

⁸⁹ See section 2(1) of New Brunswick's *Presumption of Death Act*, *supra* note 8, found at Appendix G. Also see the section 3(1) of the ULCC's *Presumption of Death Act* of 1960, *supra* note 34, found at Appendix B, where the words "deems proper" instead of "considers proper" are used.

⁹⁰ See section 3(1) of Newfoundland and Labrador's *Presumption of Death Act*, *supra* note 10, found at Appendix I.

⁹¹ See section 16 of Saskatchewan's *Missing Persons and Presumption of Death Act*, *supra* note 6, found at Appendix E.

⁹² See section 2(2) of Ontario's *Declaration of Death Act*, *supra* note 7, found at Appendix F.

⁹³ See section 8 of Nova Scotia's *Presumption of Death Act*, *supra* note 9, found at Appendix H.

an order should be given to "interested persons." This would include the Public Guardian and Trustee and, where there is a contract insuring an individual's life, an insurer, in accordance with Recommendation 1 of the Commission's Report. We are also in favour of preserving the court's discretion to provide notice to individuals other than interested persons and to direct that notice be provided in the form and manner the court wishes. In this regard, the Commission thinks that a combination of the wording contained in the notice provisions of Ontario's *Declaration of Death Act* and Newfoundland and Labrador's *Presumption of Death Act* should be added to section 2(1) of Manitoba's *Presumption of Death Act*. Having added such wording to section 2(1), the Commission is of the view that section 2(3) of Manitoba's *Presumption of Death Act* may be repealed.

Recommendation #3

Section 2(1) of Manitoba's Presumption of Death Act should be amended to read:

2(1) An interested person may, with notice to any other interested persons of whom the applicant is aware or to persons whom the court thinks appropriate or both, apply to the court for an order declaring someone to be presumed dead, and if the court is satisfied that ...

Recommendation #4

Section 2(3) of the Presumption of Death Act should be repealed.

3. Objection to an Application for a Declaration of Presumption of Death Order

Section 17 of Saskatchewan's *Missing Persons and Presumption of Death Act* gives anyone to whom notice of an application for an order declaring someone to be presumed dead has been provided, as well as anyone who claims to have a sufficient interest in the estate of the missing person, the right to file a statement of objection to the application for an order for declaration of presumption of death.⁹⁴ The statement of objection must be filed within 10 days after the last person to whom notice of an application has been provided was served with such notice, and it must set out the reasons why the individual in question objects to the application.⁹⁵ Section 17 of the Saskatchewan legislation further provides that the statement of objection must be in the prescribed form, which is found in the regulations to the Act.⁹⁶ Finally, in addition to filing a

⁹⁴ See sections 17(1) and 17(2) of Saskatchewan's *Missing Persons and Presumption of Death Act*, *supra* note 6, available at Appendix E.

⁹⁵ *Ibid.* at section 17(1).

⁹⁶ *Ibid.* at section 17(3). Also see 3 (c) of the *Missing Persons and Presumption of Death Regulations*, R.R.S., c. M-20.01, Reg. 1, which prescribes Form E, attached to the regulations as an Appendix, as the form to be used for the filing of a statement of objection. The *Missing Persons and Presumption of Death Regulations* are available online at: <http://www.qp.gov.sk.ca/documents/English/Regulations/Regulations/M20-01r1.pdf>.

statement of objection with the court, section 17 of the *Missing Persons and Presumption of Death Act* states the person making the objection must also serve a copy of his or her statement of objection on all persons to whom notice of the application for an order for declaration of presumption of death was provided, as well as to the applicant for the order for declaration of presumption of death and any persons who may have consented to the application for the order.⁹⁷

No other Canadian jurisdiction explicitly allows for the filing of a statement of objection to an application for a declaration of presumption of death order prior to such an order being made. As will be discussed later in this report, many jurisdictions allow an interested person, with leave of the court, to vary, amend, confirm or revoke such an order, but Saskatchewan is the only jurisdiction to allow for the filing of an objection in advance.

In determining whether or not to recommend that a provision similar to section 17 of Saskatchewan's *Missing Persons and Presumption of Death Act* be added to Manitoba's *Presumption of Death Act*, the Commission considered whether or not existing provisions in the *Manitoba Court of Queen's Bench Rules*⁹⁸ might function as an adequate substitute for such a provision. In particular, the Commission examined Rule 13, which allows those with an interest in the subject matter of a proceeding, those who may be adversely affected by a judgment in a proceeding or those who have a question of law or fact that is at issue in the proceeding in common with another party to the proceeding to seek leave of the court to intervene as an added party.⁹⁹ Rule 13 also allows persons to seek leave of the court to intervene, not as parties to a proceeding, but as friends of the court, to assist the court by way of argument.¹⁰⁰ We also considered Rule 5, which allows for, among other things, the joinder of parties to the proceeding where, in the court's view, a person's "presence as a party is by law necessary to enable the court to adjudicate effectively and completely on the issues in a proceeding."¹⁰¹ The Commission concluded that neither of these rules would necessarily guarantee all individuals defined as interested persons under Manitoba's *Presumption of Death Act* the right to object to a declaration of presumption of death order in all circumstances. In addition, Rule 13, which is the broader of the two rules in terms of its scope, does not automatically allow for intervention of a party with an interest in a proceeding. An intervention in this context requires leave of the court. Accordingly, the Commission is of the view that an explicit provision should be added to Manitoba's *Presumption of Death Act*, allowing an interested person, as well as any other person to whom notice of an application for declaration of presumption of death order has been provided, to file a statement of objection to the application with the court, within a prescribed time frame, before the order has been made. This new legislative provision should be modeled after section 17 of the *Missing Persons and Presumption of Death Act*, S.S. 2009, c. M-20.01.

⁹⁷ See section 17(4) of Saskatchewan's *Missing Persons and Presumption of Death Act*, *supra* note 6, available at Appendix E.

⁹⁸ M.R. 553/88, available online at: <https://web2.gov.mb.ca/laws/rules/qbr1c.php#r13>.

⁹⁹ *Ibid.* at Rule 13.01(1)(1).

¹⁰⁰ *Ibid.* at Rule 13.02.

¹⁰¹ *Ibid.* at Rule 5.03(1).

Recommendation #5

Manitoba's Presumption of Death Act should be amended to allow an interested person, as well as any other person to whom notice of an application for an order of declaration of presumption of death has been provided, to file a statement of objection to the application with the court, within a prescribed time frame, before the order has been made. The new legislative provision should be modeled after section 17 of the Missing Persons and Presumption of Death Act, S.S. 2009, c. M-20.01.

4. Application to Vary, Amend, Confirm or Revoke a Declaration of Presumption of Death Order

Section 2(3) of the ULCC's Uniform Presumption of Death Act (1976) allows an interested person, with leave of the court, to apply to the court for an order to vary, amend, confirm or revoke a presumption of death order. The presumption of death statutes in all Canadian provinces and territories that have such statutes, except for those of Manitoba, Saskatchewan, Quebec and Newfoundland and Labrador, contain similar provisions.¹⁰² The exact wording of section 2(3) of the Uniform Presumption of Death Act (1976) is as follows:

- 2(3) Any interested person may, with leave of the court, apply to the court for an order to vary, amend, confirm or revoke an order made under subsection (1).

The Commission believes that just as an "interested person" should have the right to object to an application for a declaration of presumption of death order before it is made, he or she should also have the right to apply to change, cancel, revoke or confirm the order in light of changing circumstances, such as when, for example, new evidence comes to light demonstrating that the person presumed dead is, in fact, alive. Accordingly, the Commission recommends that the provision found at section 2(3) of the Uniform Presumption of Death Act (1976) should be added to Manitoba's *Presumption of Death Act*.

Recommendation #6

Manitoba's Presumption of Death Act should be amended to add a new section, section 2(4), to the Act. Section 2(4) should read as follows:

- 2(4) Any interested person may, with leave of the court, apply to the court for an order to vary, amend, confirm or revoke an order made under subsection (1).*

¹⁰² See section 3(3) of British Columbia's *Presumption of Death Act*, *supra* note 5, available at Appendix D; section 4 of Ontario's *Declaration of Death Act*, *supra* note 7, found at Appendix F; section 4 of New Brunswick's *Presumption of Death Act*, *supra* note 8, found at Appendix G; section 3(3) of Nova Scotia's *Presumption of Death Act*, *supra* note 9, found at Appendix H; section 2(3) of The Yukon's *Presumption of Death Act*, *supra* note 11, found at Appendix J; section 2(3) of The Northwest Territories' *Presumption of Death Act*, *supra* note 12, found at Appendix K and section 2(3) of Nunavut's *Presumption of Death Act*, *supra* note 13, found at Appendix L.

5. Disposition of Property Following a Declaration of Presumption of Death Order

Prior to the enactment of Manitoba's *Presumption of Death Act* in 1967, the Honourable Sterling Lyon, then Attorney General for the Province of Manitoba, sought the opinion of the Law Reform Committee, this Commission's predecessor, as to whether or not it would be advisable to enact the ULCC's model statute, the *Presumption of Death Act* of 1960.¹⁰³ The Law Reform Committee, in turn, sought input from various stakeholders as to the advisability of enacting this model statute and, if so, whether or not any changes to the Act should be considered. One member of the Manitoba Bar expressed concern, at that time, that the Act was silent regarding what might happen to someone who acts in reliance upon a declaratory order made under the Act in circumstances where the person who has been presumed dead turns out to be, in fact, alive, expressing the view that the statute should offer some protection to those who act in such circumstances.¹⁰⁴ This suggestion, however, never made its way into Manitoba's *Presumption of Death Act* as an amendment.

Manitoba's *Presumption of Death Act* is effectively silent with respect to how the property of an individual who has been made the subject of a declaration of presumption of death order is to be dealt with once this declaration has been made. It also offers no statutory protection from liability to individuals who distribute property of those subject to such orders, where the individuals charged with distributing this property do so in good faith reliance upon the order. Section 3(1) of the Act merely states that a declaration of presumption of death order, or a certified copy of such an order, is, if the order is made for all purposes, conclusive as proof of death for all purposes requiring such proof. Alternatively, if the order has only been made for some, but not all, purposes, the order, or a certified copy of it, is conclusive proof of death for the purposes for which it was made.¹⁰⁵

By contrast, the ULCC's Uniform Presumption of Death Act (1976) contains specific provisions that offer statutory protection from liability, at least to a certain extent, to personal representatives¹⁰⁶ who distribute the property of missing persons subject to an order declaring them to be presumed dead, but who turn out to be, in fact, alive, in circumstances where the personal representatives have acted in good faith reliance upon the order. It offers similar protection from liability to personal representatives in cases where a person is presumed dead by virtue of a court order, and it is later discovered that while the person has, in fact, died, he or she died after the declaration of presumption of death order had been made. In addition to providing statutory protection from liability for personal representatives in such circumstances, the ULCC 1976 model Act also outlines how the property of someone who is the subject of a declaration of presumption of death order is to be dealt with.

¹⁰³ Letter from G.S. Rutherford, Secretary, entitled *Re: Presumption of Death Act*, directed to the Law Reform Committee and dated 03 October 1967, Archives of Manitoba.

¹⁰⁴ Letter from A. Lorne Campbell, Aikins MacAulay and Company, Barristers and Solicitors, entitled *Re: Proposed "The Presumption of Death Act,"* directed to G.S. Rutherford, Law Reform Committee and dated 11 October 1967, Archives of Manitoba.

¹⁰⁵ Newfoundland and Labrador's *Presumption of Death Act*, *supra* note 10, found at Appendix I, is also silent in this regard. See section 4 of this Act.

¹⁰⁶ At common law, a personal representative is either an executor or an administrator of a deceased person's estate.

Section 3 of the Uniform Presumption of Death Act (1976) states that when an order declaring someone presumed dead has been made for all purposes, or for the purposes of distributing the estate of a deceased person, but the personal representative of an individual who has been presumed dead has reason to believe that the subject is, in fact alive, the personal representative shall not deal any further with that person's estate unless a new order, confirming the presumption of death, has been issued by a court.

If, however, all or some or all of the property of a person who has been presumed dead has already been distributed, and the distribution was made in good faith (i.e. pursuant to a court order declaring someone to be presumed dead, and in circumstances where the personal representative had no reasonable grounds to believe that the subject of the order was still alive), section 4(1) of the Uniform Presumption of Death Act specifies that the property distribution which has already taken place up to that point is considered final. The property will be deemed to belong to the person to whom it was distributed and not the person who was presumed dead pursuant to court order. Because section 4(1) makes property distribution that has been carried out in these circumstances final, this provision should also have the effect of insulating a personal representative from claims that he or she must compensate the missing person for the act of distributing the missing person's property to others.

This does not, however, leave a missing person, who is the subject of an order declaring him/her to be presumed dead, but who is, in fact, alive, with no legal recourse whatsoever. Section 4(2) of the ULCC's 1976 model statute states that when a person who has been presumed dead has been found by the court to be alive, an interested person (which would include the person presumed dead, since "interested person" is defined to include "any person who is or would be affected by an order made under this Act"¹⁰⁷) can apply to the court for directions respecting the property of the person found to be alive, including directions as to the preservation and return of that property. The rights granted under section 4(2) of the ULCC's 1976 statute, are, however, subject to section 4(1) of that Act. In other words, reading sections 4(1) and 4(2) of the Uniform Preservation of Death Act (1976) together, if all or some of the property of the missing person who was presumed dead has already been distributed, the property which has already been distributed belongs to the new owner, as long it was distributed by the personal representative of the person presumed dead in good faith and in reliance upon a declaration of presumption of death order. However, if there is property of the missing person which has yet to be distributed, section 4(2) would allow the formerly missing person to apply to the court for an order to preserve his or her property and obtain its return. Before a person who has been presumed dead by court order, but who is, in fact, alive, can apply to the court for an order seeking the preservation and return of his/her remaining, undistributed property, however, section 4(2) specifies that he or she must be "found by the court to be alive." In other words, by implication, the individual who has been presumed dead by court order must first apply to the court to revoke the declaration of presumption of death order before applying for the preservation and return of any remaining, undistributed property.

Section 5(1) of the Uniform Presumption of Death Act (1976) also provides certainty and clarity regarding property distribution in circumstances where a person who is presumed to be dead by

¹⁰⁷ See section 1 of the ULCC's Uniform Presumption of Death Act (1976), *supra* note 64, found at Appendix B.

virtue of a court order turns out to have died, but after the date that he or she was presumed to be dead by court order. It is designed to deal with circumstances where the timing of a person's death may determine who can inherit property. Just as is the case with section 4(1), section 5(1) of the ULCC's 1976 model statute states that any distribution of property belonging to an individual that is the subject of a declaration of presumption of death order that was carried out in good faith reliance upon the order is considered final. In such circumstances, the property will belong to the person to whom it was distributed, rather than to the person who might otherwise have inherited it had the declaration of presumption of death order not been made prior to the person's actual death.

The provisions found at sections 3 to 5 of the ULCC's Uniform Presumption of Death Act (1976) impart certainty with respect to distribution of property and property ownership in presumption of death situations. They also shield personal representatives from liability when these representatives distribute property in good faith reliance upon a court order declaring a missing person to be dead. In deeming property distribution which has occurred in these circumstances to be final, the provisions should operate to protect personal representatives from claims for compensation for erroneous distribution of property made by missing persons who are the subjects of erroneous presumption of death orders, or, alternatively, in the case of individuals who have been died after the date they were presumed dead, from similar claims for compensation made by the heirs of such individuals.

It is interesting to note while all Canadian jurisdictions that have presumption of death statutes of general application, with the exception of Manitoba and Newfoundland and Labrador, establish a framework that governs how property is to be distributed following the issuance of a court order declaring someone presumed dead, not all of these statutes afford personal representatives the same degree of certainty with respect to statutory protection from liability, because some of these statutes allow an individual who has been presumed dead by court order, but who later turns out to be alive, to reclaim the property which has already been distributed to others and/or to obtain compensation in lieu of having the property returned to him or her.

British Columbia,¹⁰⁸ Nova Scotia,¹⁰⁹ the Yukon,¹¹⁰ the Northwest Territories¹¹¹ and Nunavut¹¹² all follow the framework of the ULCC's 1976 model statute. The general presumption of death statutes in these jurisdictions all state that distribution of property made in good faith, upon reliance on an order declaring an individual to be presumed dead, is final. Even if a missing person should turn out to be alive at some future point, he or she would only be able to lay claim to that portion of his or her property that remains undistributed at the time that that he/she is determined to be alive. Similarly, in circumstances where a person was erroneously presumed dead by court order, having died after the time he or she was erroneously presumed to be dead, the heirs of the person in question would not come in for a share of the property. Property distribution in this latter circumstance is also considered to be final.

¹⁰⁸ See sections 4 to 6 of British Columbia's *Presumption of Death Act*, *supra* note 5, found at Appendix D.

¹⁰⁹ See sections 4 to 6 of Nova Scotia's *Presumption of Death Act*, *supra* note 9, found at Appendix H.

¹¹⁰ See sections 3 to 5 of the Yukon's *Presumption of Death Act*, *supra* note 11, found at Appendix J.

¹¹¹ See sections 3 to 5 of the Northwest Territories' *Presumption of Death Act*, *supra* note 12, found at Appendix K.

¹¹² See sections 3 to 5 of Nunavut's *Presumption of Death Act*, *supra* note 13, found at Appendix L.

Some provinces, however, give more rights to the missing person in terms of recovering his/her property when a presumption of death order later turns out to be erroneous. For example, while section 20(1) of Saskatchewan's *Missing Persons and Presumption of Death Act*¹¹³ states that the distribution of property, made in good faith reliance upon a court order declaring someone to be dead, is final, and any property so distributed becomes the property of the person it has been distributed to as against the person presumed to be dead, section 20(1) of the Saskatchewan statute is subject to section 20(2) of that Act. Section 20(2) allows a missing person who has been presumed dead pursuant to a court order to apply for the preservation and return of his or her property. These two provisions, when read together, appear to imply that notwithstanding the fact that property of a person that has been presumed dead has been distributed to another person in good faith reliance upon a declaration of presumption of death order, if the person presumed dead later turns out to be alive, he or she could apply for the return of property already distributed.

In such circumstances, it is possible that the courts would hold the personal representative who distributed the property, the person to whom the property was distributed, or both, liable for all or some of the loss suffered by the missing person. The courts could require the personal representative or new property owner to compensate the formerly missing person for the loss of his property, including requiring the personal representative or new property owner to pay the costs necessary to return the property to the original owner. While it seems more likely that the person to whom the property was distributed would be the one ordered to pay these costs, it is not outside the realm of possibility that the personal representative might incur some costs as well. The Saskatchewan legislation, therefore, while still providing a framework for the distribution of property where someone has been presumed dead by court order, appears to favour the property rights of the person who was declared presumed dead, and later turns out to be alive, over those to whom the property was distributed in good faith reliance upon a declaration of presumption of death order, and potentially, over the rights of the personal representative.

Ontario's *Declaration of Death Act* is even more explicit in terms of favouring the property rights of a person presumed dead by court order who later turns out to be alive. Again, notwithstanding the fact that Ontario's legislation contains a provision stating that distribution of property that has been made in good faith reliance upon a court order declaring a missing person presumed dead is considered final,¹¹⁴ section 6(3) of Ontario's *Declaration of Death Act* states that the court may, if it considers it just to do so, order that some or all of the missing person's property be returned to him or her or order that the missing person be paid a specified amount of money. When considering making such an order, however, the court must, in accordance with section 6(4) of the Act, consider all of the circumstances, including any inconvenience or hardship suffered by the individual who is required to reconvey the property back to the missing person or pay the missing person money in lieu of reconveying the property. Sections 6(5) and 6(6) specify that any property reconveyed back to the missing person shall be deemed never to have been distributed in the first place and any monies paid to the missing person in lieu of reconveying the property back to him/her shall be deemed to have belonged to the missing person prior to distribution. Finally, section 6(7) of the Ontario statute further specifies that any

¹¹³ See *supra* note 6, found at Appendix E.

¹¹⁴ See section 6(1) of Ontario's *Declaration of Death Act*, *supra* note 7, found at Appendix F.

property which has not yet been distributed at the time that the individual who has been presumed dead pursuant to court order turns out to be alive belongs to the formerly missing person, is to be held in trust under the *Trustee Act*, and shall be returned as the court directs.

New Brunswick's *Presumption of Death Act* almost exactly mirrors those found in Ontario's *Declaration of Death Act* when it comes to dealing with the distribution of property in circumstances where a missing person who has been declared to be presumed dead by court order later turns out to be alive.¹¹⁵

The relevant provisions in the *Civil Code of Quebec*, like the provisions found in the presumption of death legislation in Saskatchewan, Ontario, and New Brunswick, favour the property rights of the person who has been declared to be presumed dead by the court, but who turns out to be alive, over the property rights over person to whom his/her property has been distributed in his or her absence; however, they are different from all of the other provisions in that they require the formerly missing person who recovers his or her property to pay those who were in good faith possession of his property during the time that he or she was presumed dead, for discharging his/her obligations in respect to the property. Likewise, the relevant *Civil Code* provisions specify that any heirs to the property are entitled to keep the fruits and revenues of the property earned or acquired during the time that they held it until such time as the property is returned to the formerly missing person.¹¹⁶

It is also important to note that while Manitoba's *Presumption of Death Act* is silent in terms of outlining how property is to be distributed in the event that someone subject to an order declaring him/her to be presumed dead turns out to be alive, this does not mean that Manitoba has no legislative provisions that might apply in such circumstances. Section 83 of Manitoba's *Trustee Act*¹¹⁷ contains provisions that govern distribution of property under a will, or distribution of property under circumstances when a person has died intestate and an administrator has been appointed, but where the grant of probate or the appointment of an administrator has been revoked. While a grant of probate or an appointment of an administrator may be revoked due to circumstances other than an erroneous presumption of death, section 83(1) of the Act specifically outlines the rules that are to apply when the revocation occurs in these specific circumstances. The legislative provisions found at section 83 of the *Trustee Act* bear some similarity to those governing the distribution of property in the presumption of death legislation in Saskatchewan, Ontario and New Brunswick, because they permit the supposed decedent the right to recover his or her property. However, section 83 of the *Trustee Act* also provides more statutory protection to the personal representative than is accorded to personal representatives under the presumption of death legislation of general application in Saskatchewan, Ontario and New Brunswick.

Section 83(1) of the *Trustee Act* states that any acts undertaken by a personal representative under grant of probate or as estate administrator before revocation of the grant or appointment continue to be valid and effectual as if grant of probate or the appointment of an administrator had been rightly granted or made, provided that these acts were undertaken in good faith. This provision serves to explicitly insulate the personal representative from liability for any acts he or

¹¹⁵ See sections 6(1) to 6(5) of New Brunswick's *Presumption of Death Act*, *supra* note 8, found at Appendix G.

¹¹⁶ See articles 99 to 101 of the *Civil Code of Quebec*, *supra* note 14, found at Appendix M.

¹¹⁷ C.C.S.M. c. T160. A copy of section 83 of the *Trustee Act* is available at Appendix Q to this report.

she undertakes under these conditions. Pursuant to section 83(3) of the *Trustee Act*, however, the personal representative is only protected from liability as long as he or she has not been party or privy to any fraud in terms of obtaining the grant of probate or appointment as administrator. In addition, if the personal representative becomes aware of any fact that would lead to a revocation of probate or appointment (such as, presumably, the fact that the person for whose estate a grant of probate has been made, or an administrator has been appointed, is not, in fact, dead) and chooses to act anyway, the personal representative may likewise be liable.

Section 83(1) of the *Trustee Act* further specifies that in circumstances where the grant of probate or appointment of administrator has been revoked due to an erroneous presumption of death, any property of the person who has been erroneously presumed dead which has not yet been distributed may be recovered by the supposed decedent. Subject to any statutory limitation, the supposed decedent may also recover any part of the property erroneously received by a devisee, legatee, next of kin or spouse back from the person who inherited it, or alternatively, the supposed decedent may recover the value of this property from the person(s) who inherited it. Pursuant to section 83(2), however, the personal representative is entitled to retain costs and expenses he/she incurred when administering the estate, prior to revocation of probate or appointment of an administrator, out of the undistributed portion of estate.

In the Commission's view, Manitoba's *Presumption of Death Act* should be amended in such a manner as to provide statutory protection from liability for personal representatives, who, acting in good faith reliance upon an order declaring someone presumed dead, distribute all or part of a missing person's estate. Such statutory protection should only be available, however, in circumstances where there are no reasonable grounds to believe that the missing person is, in fact, alive.

Sections 3 to 5 of the ULCC's Uniform Presumption of Death Act (1976), like the relevant provisions found in the presumption of death statutes of general application in British Columbia, Nova Scotia, the Yukon, the Northwest Territories and Nunavut, provide more finality in terms of who is entitled to the missing person's property in the event that the missing person who has been presumed dead by court order, turns out to be, in fact, alive, or alternatively, turns out to be dead, but at some time after he/she has been presumed dead, compared to the property distribution provisions contained in the Saskatchewan, Ontario, New Brunswick or Quebec presumption of death statutes. As a result, sections 3 to 5 of the ULCC's Uniform Presumption of Death Act (1976) also afford more protection from liability to personal representatives than the property distribution provisions found in the presumption of death statutes of Saskatchewan, Ontario, New Brunswick or Quebec. The Commission accordingly recommends that provisions equivalent to sections 3 to 5 of the ULCC's Uniform Presumption of Death Act (1976) be added to Manitoba's *Presumption of Death Act*, subject to two significant modifications.

The first modification would extend the protection provided to personal representatives under section 3 to 5 of the ULCC's Uniform Presumption of Death Act (1976) to insurance trustees. In its response to the Commission's Consultation Report on the *Presumption of Death Act*, the Great-West Life Assurance Company stated that, in its view, an insurance trustee who, in good faith reliance upon a presumption of death order made in relation to a missing person, receives life insurance monies in trust for a minor beneficiary and use some of these funds to care and

educate this minor, for example, should be entitled to a same statutory protection from liability as a personal representative.¹¹⁸ The Commission agrees with this submission, and accordingly recommends that in adding provisions equivalent to sections 3 to 5 of the ULCC's Uniform Presumption of Death Act (1976) to Manitoba's *Presumption of Death Act*, the wording of these provisions be amended to ensure that not only personal representatives but also insurance trustees are statutorily protected from liability in circumstances where they have distributed the property of a missing person and have done so in good faith reliance upon a declaration of presumption of death order.

Secondly, the Commission believes that some of the wording contained in section 3 of the ULCC's 1976 model statute may need to be changed. Section 3 states:

3. Where an order has been made declaring that person shall be presumed to be dead for all purposes or for the purpose of distributing his estate, and the personal representative of the person presumed to be dead *believes or there are reasonable grounds for him to believe* that the person is not in fact dead, the personal representative shall not thereafter deal with the estate or remaining estate unless the presumption of death is confirmed by an order made under section 2(3). [emphasis added]

The Commission's position is that the phrase "believes or has reasonable grounds to believe" lessens the protection from liability for personal representatives, who may, as this provision is currently worded, feel compelled to seek a confirmation order from the court, reaffirming that someone is still presumed dead, when a mere rumor reaches his or her ears that that the person in question is, in fact, alive, or when he/she subjectively believes, on the basis of no evidence, that the person in question may be alive. In the Commission's view, the words "believes or there are reasonable grounds for him to believe" should be replaced by the words "has reasonable grounds to believe."

In its deliberations, the Commission also considered whether or not provisions equivalent to sections 83(1) to 83(3) of Manitoba's *Trustee Act* should be added to the *Presumption of Death Act* as an alternative to the wording found in sections 3 to 5 of the ULCC's 1976 model statute. It also considered whether or not it should recommend a repeal of section 83 of the *Trustee Act*. The provisions found in section 83(1) to 83(3) do seem to strike a balance between shielding the personal representative from liability for any acts he/she undertakes before a grant of probate or an appointment of an administrator has been revoked for any reason, including an erroneous presumption of death, and giving the person who has been presumed dead some rights with respect to the return of his or her property. However, in the Commission's view, these provisions may go too far in terms of protecting the rights of the person who was presumed dead.

¹¹⁸ Letter entitled *Re: Great-West Life Assurance Company's Response to Comment on the August 2015 Consultation Report: Improving Manitoba's Presumption of Death Act*, *supra* note 84. In this letter, Gary Senft, Vice President and Associate General Counsel, Public Policy and Regulatory Affairs, Great-West Life Assurance Company stated:

As drafted, Provisional Recommendation #7 only deals with a "personal representative." A similar circumstance could arise where a person is acting as an insurance trustee. It would appear appropriate for the insurance trustee to be dealt with in a similar manner to a "personal representative" where there is reasonable grounds to believe that the person is not in fact dead.

They do not allow for sufficient finality with respect to property distribution. They also require the court to revoke a grant of probate or the appointment of an administrator before the personal representative stops distributing the property of the person who has been presumed dead. For these reasons, the Commission prefers the wording found in sections 3 to 5 of the ULCC's Uniform Presumption of Death Act (1976).

Should provisions equivalent to sections 3 to 5 of the ULCC's Uniform Presumption of Death Act (1976) be added to Manitoba's *Presumption of Death Act*, they may operate to nullify one portion of section 83(1) of the *Trustee Act*. Were this to occur, the property distribution provisions contained in the *Presumption of Death Act* would create a statutory limitation that would prevent a person who has been erroneously presumed dead, in circumstances where the grant of probate or appointment of an administrator for his or her estate has been revoked for that reason, from recovering his or her distributed property from those who have already inherited it (section 83(1) states that the supposed decedent may only recover his or her distributed property from someone that inherited it "subject to any statutory limitation").

Notwithstanding that the addition of provisions equivalent to sections 3 to 5 of the ULCC 1976 model statute to the *Presumption of Death Act* would create a statutory limitation to the operation of one portion of section 83(1) of the *Trustee Act* the Commission is not recommending the repeal of some or all of section 83. As mentioned earlier in this report, a grant of probate or the appointment of administrator may be revoked for reasons other than the erroneous presumption of death. Accordingly, the remainder of section 83(1), along with sections 83(2) and 83(3) of the *Trustee Act* would still have utility, and would continue to apply in circumstances where the grant of probate or appointment of administrator was revoked for other reasons.

Recommendation #7

Manitoba's Presumption of Death Act should be amended to add provisions that create a framework for the distribution of the property of those subject to an order declaring them to be presumed dead. This framework should provide statutory protection from liability for personal representatives and insurance trustees who may be charged with distributing the property of these individuals. The new provisions should mirror those found in sections 3 to 5 of the Uniform Law Conference of Canada's Uniform Presumption of Death Act (1976) but with necessary amendments made for insurance trustees. In addition, the words "presumed to be dead believes or there are reasonable grounds for him to believe," found in section 3 of Uniform Law Conference of Canada's Uniform Presumption of Death Act (1976) Act, should be replaced by the words "has reasonable grounds to believe."

6. Appeal From a Declaration of Presumption of Death Order

Manitoba's *Presumption of Death Act* contains no explicit provision allowing for an appeal from an order declaring an individual to be presumed dead. While Manitoba is not the only jurisdiction with presumption of death legislation that is silent in this regard (the presumption of death statutes of Saskatchewan, New Brunswick, and Newfoundland and Labrador likewise

contain no appeal provision), the presumption of death statutes in all other Canadian jurisdictions with presumption of death legislation of general application explicitly allow for an appeal of an order declaring someone to be presumed dead, either to the Court of Appeal,¹¹⁹ or, in the case of Ontario, to the Divisional Court.¹²⁰ The ULCC's Uniform Presumption of Death Act (1976) also contains an appeal provision.¹²¹ Most of these provisions restrict the right of appeal to "an interested person" or "any interested person."

Although, presumably, pursuant to section 25(1) of the *Court of Appeal Act*,¹²² a decision to issue a declaration of presumption of death order may be appealed to the Manitoba Court of Appeal, the Commission thinks that it is salutary to add an appeal section to Manitoba's *Presumption of Death Act*.

Recommendation #8

Manitoba's Presumption of Death Act should be amended to allow for an appeal from a declaration of presumption of death order to the Court of Appeal.

7. Absentee Guardianship for Individuals Who Are Missing But Not Subject to a Declaration of Presumption of Death Order

As stated earlier in this report, the common law rule governing presumption of death required that an individual be absent and unheard from for at least seven years before an applicant for a declaration of presumption of death order would benefit from the rebuttable presumption that the missing individual had died. The legislative replacement for this common law rule, presumption of death legislation, does not require a specific period of absenteeism, although the common law rule has been preserved in the presumption of death statutes of Ontario and Nova Scotia, at least in certain circumstances.¹²³ Nonetheless, a significant period of absenteeism is usually involved before a court will issue an order declaring someone to be dead, unless it can be shown that an applicant went missing in circumstances of peril that may immediately give rise to a reasonable presumption of death (such as, for example, in circumstances where someone's body cannot be recovered after a plane crash or a bombing).

¹¹⁹ See section 7 of British Columbia's *Presumption of Death Act*, *supra* note 5, found at Appendix D; section 7 of Nova Scotia's *Presumption of Death Act*, *supra* note 9, found at Appendix H; section 6 of the Yukon's *Presumption of Death Act*, *supra* note 11, found at Appendix J; section 6 of the Northwest Territories' *Presumption of Death Act*, *supra* note 12, found at Appendix K; section 6 of Nunavut's *Presumption of Death Act*, *supra* note 13, found at Appendix L; and article 26(6)(b) of the Quebec Code of Civil Procedure, C.Q.L.R., c. C-25.

¹²⁰ See section 8 of Ontario's *Declaration of Death Act*, *supra* note 7, found at Appendix F.

¹²¹ See section 6 of the ULCC's Uniform Presumption of Death Act (1976), *supra* note 64, found at Appendix B.

¹²² C.C.S.M. c. C240. Section 25(1) of the *Court of Appeal Act* gives Manitoba's Court of Appeal "all the jurisdiction and powers possessed by the Court of Queen's Bench sitting en banc immediately prior to July 23, 1906."

¹²³ See section 2(5) of Ontario's *Declaration of Death Act*, *supra* note 7, found at Appendix F and section 9 of Nova Scotia's *Presumption of Death Act*, *supra* note 9, available at Appendix H.

Given that it may take years before a court is willing to issue an order declaring a missing person to be presumed dead, what happens to the missing person's property and/or dependents during the intervening period? It is reasonable to assume that, during that period, the financial affairs of the missing may need attention. It may also be necessary to provide for the missing person's dependants. Three Canadian provinces have statutes that explicitly allow the courts to appoint someone to look after the affairs of a missing person prior to the issuance of declaration of presumption of death order: Saskatchewan,¹²⁴ Ontario,¹²⁵ and New Brunswick.¹²⁶ The State of Victoria in Australia has similar legislation.¹²⁷ The Commission believes that Manitoba should follow the example of these jurisdictions and enact provisions that provide for absent guardianship for missing persons. The Commission is also of the view that these provisions should be added to the *Presumption of Death Act*, rather than adding such provisions to another Act or enacting a separate statute to deal with these matters, as doing so is likely to facilitate public notice of the provisions.

In his response to the Commission's August 2015 Consultation Report on the *Presumption of Death Act*, the Public Guardian and Trustee of Manitoba indicated his agreement in principle with the idea of absent guardianship for missing persons, stating that "there may be some circumstances where the appointment of an absentee guardian is appropriate."¹²⁸ However, he also noted that "different jurisdictions . . . take different approaches to the appointment of an absentee guardian."¹²⁹ Specifically referencing the Saskatchewan legislation and the extensive role played by the Public Guardian and Trustee of Saskatchewan in absent guardianship in that jurisdiction, Manitoba's Public Guardian and Trustee commented that he does not see his office playing such an extensive role.¹³⁰

With respect to the role that his office should play in acting as an absent guardian for a missing person, the Public Guardian and Trustee of Manitoba stated:

I would consider the involvement of the Public Guardian and Trustee to be within this office's mandate where there is an heir-at-law of the person for whom an absentee guardian is sought who is under mental disability or a minor. If all of the parties with an interest in the matter are competent adults, the parties with an interest in the matter would be the most appropriate persons [to] deal with the issue. In situations where the heirs-at-law were unknown, I anticipate that the Public Guardian [and] Trustee would look at each situation on a case-by-case basis prior to making the decision whether to involve the office as an absentee guardian.¹³¹

¹²⁴ See sections 3 to 14 of Saskatchewan's *Missing Persons and Presumption of Death Act*, *supra* note 6, found at Appendix E.

¹²⁵ See section 3 of Ontario's *Declaration of Death Act*, *supra* note 7, found at Appendix F, and Ontario's *Absentees Act*, R.S.O. 1990, c. A.3., found at Appendix R to this report.

¹²⁶ See section 3 of New Brunswick's *Presumption of Death Act*, *supra* note 8, found at Appendix G.

¹²⁷ See sections 60AA to 60AJ of the *Guardianship and Administration Act 1986*, No. 58 (Vic), available online at: http://www.austlii.edu.au/au/legis/vic/consol_act/gaaa1986304/index.html.

¹²⁸ Letter entitled *Re: Consultation Report on the Presumption of Death Act*, Douglas R. Brown, Public Guardian and Trustee of Manitoba, *supra* note 82.

¹²⁹ *Ibid.*

¹³⁰ *Ibid.*

¹³¹ *Ibid.*

Recommendation #9

Manitoba's Presumption of Death Act should be amended to add provisions for absent guardianship, as has been done in Saskatchewan's Missing Persons and Presumption of Death Act, Ontario's Absentees Act, New Brunswick's Presumption of Death Act and the Guardianship and Administration Act 1986 of Victoria, Australia.

8. Should the Exemption for Life Insurance Matters Be Removed from the *Presumption of Death Act* and the *Insurance Act*?

As noted elsewhere in this report, Manitoba's *Presumption of Death Act*, like the presumption of death legislation of all other Canadian provinces except British Columbia, Ontario, and Quebec,¹³² carves out an exemption for life insurance policies, expressly exempting these policies from the operation of the Act. An implicit exemption has also been created, through the operation of principles of statutory interpretation, for accident and sickness policies where the claimant is attempting to obtain a declaration of presumption of death to collect on an insured's accidental death benefits.¹³³ Should Manitoba's *Presumption of Death Act* and *Insurance Act* be amended to provide that an order declaring someone to be presumed dead, made under the *Presumption of Death Act*, is proof of death in all matters for which it has been made, including for the purpose of life insurance and accident and sickness insurance policies?

As discussed earlier in this report, when Bill S-7, which later became the *Presumption of Death Act*, was introduced in the Manitoba Legislature, it, like the ULCC's *Presumption of Death Act* of 1960, contained no provision expressly exempting life insurance matters from the ambit of the statute. Section 3(2) of the *Presumption of Death Act*, the section which adds this exemption, was introduced as an amendment to the bill by the then Attorney General, the Honourable Sterling Lyon, in Committee, prior to second reading. A review of the *Debates and Proceedings* of the Manitoba Legislative Assembly during the relevant time period reveals that this amendment was introduced after the Committee studying the bill heard from a "representative of the Legal Department of a life insurance company."¹³⁴ However, no detail is provided as to what the concerns of the insurance industry may have been at that time.

The Commission has thoroughly reviewed the presumption of death provisions contained in Manitoba's *Insurance Act*. Earlier in this report, we provided an overview of the relevant provisions: those found at sections 180 and 186 to 191 of the *Insurance Act*,¹³⁵ which deal with life insurance matters, and are expressly exempted from the *Presumption of Death Act* by

¹³² See *supra* note 58. The presumption of death statutes of Scotland, Northern Ireland and England and Wales also specify that an order declaring someone dead made pursuant to these statutes is valid for all purposes. See section 3(1) of the *Presumption of Death (Scotland) Act 1977*, *supra* note 15; section 3 of the *Presumption of Death Act (Northern Ireland) 2009*, *supra* note 16; and section 3(2) of the *Presumption of Death Act 2013*, *supra* note 17.

¹³³ For a brief discussion of this implicit exemption, please see pp. 11 and 12 of this report.

¹³⁴ *Debates and Proceedings*, *supra* note 40, Vol. XIV, No. 53, pp. 1311 and 1312, Mr. Cherniack.

¹³⁵ A copy of these provisions may be found in Appendix C to this report.

operation of section 3(2) of that Act, and those found at sections 230.4 to 230.9 of the *Insurance Act*, which deal with presumption of death for the purpose of accidental death claims made under accident and sickness insurance policies. With respect, the Commission can see no reason why it is necessary to have separate rules for obtaining a declaration of presumption of death order for life insurance or accident and sickness insurance policy purposes.

Some members of the insurance industry may be concerned that removing the presumption of death provisions contained in the *Insurance Act*, including the requirement that a claimant must wait seven years before applying for a declaration of presumption of death for the purpose of collecting on an insured's life insurance or accident or sickness insurance policy, may tempt claimants to commit fraud. However, the Commission does not think so. The Commission believes that, prior to issuing an order under section 2(1) of the *Presumption of Death Act*, the court will require an applicant to have made a reasonably thorough investigation as to whether or not a person is alive or dead and to provide such evidence to the court. In any case, if an insurer has concerns, the insurer can make a case for the presumption of death order not to apply to an insurance policy, since section 2(1) of the *Presumption of Death Act* allows the court to "make an order declaring that the person shall be presumed dead for all purposes, or for such purposes only as are specified in the order." The Commission is therefore of the view that the *Presumption of Death Act* and the *Insurance Act* should be amended to expressly state that an order declaring someone to be presumed dead, made under the *Presumption of Death Act* is proof of death in all matters for which it has been made, including for life insurance and accident and sickness insurance policies.

The Commission received support for its position on this issue in the response provided by the Great-West Life Assurance Company to the Commission's Consultation Report on the *Presumption of Death Act*. In its submission, the Great-West Life Assurance Company stated:

We agree with [amending the *Insurance Act* as proposed in] Provisional Recommendation #11 and if this approach is adopted and applied to *The Insurance Act*, we support the suggestion that such amendments should contain a clear reference under both *Part V: Life Insurance* and *Part VI: Accident and Sickness Insurance* to *The Presumption of Death Act*, similar to what has been done in Ontario.¹³⁶

Recommendation #10

Section 3(2) of Manitoba's Presumption of Death Act should be repealed.

¹³⁶ Letter entitled *Re: Great-West Life Assurance Company's Response to Comment on the August 2015 Consultation Report: Improving Manitoba's Presumption of Death Act*, *supra* note 84.

Recommendation #11

Manitoba's Insurance Act should be amended to provide that an order declaring a person to be presumed dead, made under the Presumption of Death Act, functions as a declaration of presumption of death order for life insurance purposes and for the purposes of accidental death benefit claims made under accident and sickness insurance policies, unless the court expressly exempts the order from being used for such purposes.

9. Recognition of Declaration of Presumption of Death Orders Made in Other Jurisdictions

In 1967, during the time when the Law Reform Committee was considering whether or not to recommend that the Manitoba Legislative Assembly enact the ULCC's Presumption of Death Act of 1960, the Committee received a letter from Harold McKay, Registrar General of Land Titles, suggesting "that consideration be given to the effect of orders made under similar Acts by Courts outside the Province."¹³⁷ In other words, the Registrar was asking the Committee to consider whether or not an amendment should be made to the proposed presumption of death legislation to allow declaration of presumption of death orders made in other jurisdictions to be recognized here in Manitoba. The Law Reform Committee made no recommendation to the Attorney General on this matter at that time, and no such provision exists in the presumption of death legislation of any jurisdiction in Canada.

With respect to orders declaring an individual to be presumed dead that are made by courts in other Canadian jurisdictions, presumably Manitoba's *Enforcement of Canadian Judgments Act*¹³⁸ would operate to allow such orders to be registered here, and to be enforced in Manitoba as if they had been made by the Court of Queen's Bench.¹³⁹ With respect to recognition of orders declaring persons to be presumed dead made in jurisdictions outside Canada, it is possible that, at some point, Manitoba's *Enforcement of Judgments Conventions Act*¹⁴⁰ might allow for such reciprocal recognition. This statute allows for the recognition and enforcement of foreign judgments in Manitoba when there is a convention, treaty or international agreement in place between Canada and another country with respect to the recognition and enforcement of judgments and that agreement, treaty or convention is included in the Schedule to the Act. However, while the *Enforcement of Judgments Conventions Act* is itself in force, no Schedule to the Act has yet been proclaimed. Accordingly, to obtain recognition of non-Canadian declaration of presumption of death orders in Manitoba, one would likely be forced to rely upon common law tests for recognition of foreign judgments, such as the ones used for recognition of foreign divorce decrees in Canada. In such cases, courts take into consideration factors such as

¹³⁷ Letter to G.S. Rutherford, Secretary to the Law Reform Committee, October 4, 1967, Archives of Manitoba.

¹³⁸ C.C.S.M. c. E116.

¹³⁹ *Ibid.* See the definition of "Canadian judgment" found at section 1(1) of the Act, as well as sections 2(1), 3 and 4 of the Act.

¹⁴⁰ C.C.S.M. c. E117.

domicile of the parties, place of habitual residence, and real and substantial connection between the subject matter, the parties and the forum.¹⁴¹

While orders declaring someone presumed dead in other Canadian jurisdictions may be easily registered and recognized in Manitoba by operation of the *Enforcement of Canadian Judgments Act*, and while recognition of orders declaring a person to be presumed dead that have been made outside of Canada may be possible, the Commission believes that it would be advisable to amend Manitoba's *Presumption of Death Act* to stipulate that declaration of presumption of death orders issued by courts in other Canadian jurisdictions shall be recognized in accordance with the process found in the *Enforcement of Canadian Judgments Act*, and that declaration of presumption of death orders issued by tribunals in non-Canadian jurisdictions shall be recognized if made pursuant to legislation substantially similar to the provisions of Manitoba's *Presumption of Death Act*.

Recommendation #12

Manitoba's Presumption of Death Act should be amended to stipulate that declaration of presumption of death orders issued by courts in other Canadian jurisdictions shall be recognized in accordance with the process found in the Enforcement of Canadian Judgments Act, C.C.S.M. c. E116, and that declaration of presumption of death orders issued by tribunals in non-Canadian jurisdictions shall be recognized if made pursuant to legislation substantially similar to the provisions of Manitoba's Presumption of Death Act.

¹⁴¹ See section 22 of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp). Also see *Orabi v. Qaoud*, 2005 NSCA 28 at para. 14; *Nowacki v. Nowacki*, 2014 ONSC 2052 at paras. 92 to 96; *Zhang v. Lin*, 2010 ABQB 420 at paras. 46 to 29; and *Asghar v. Doyle*, 2014 NBQB 254 at paras. 14 to 18.

CHAPTER 4: ADDITIONAL MATTERS CONSIDERED BY THE COMMISSION

There are three additional matters which the Commission considered, but which the Commission only flags, making no recommendation.

1. Combining Related Acts

Saskatchewan has combined its legislation respecting missing persons and presumption of death.¹⁴² British Columbia had previously combined its legislation respecting survivorship and presumption of death, but repealed the survivorship provisions in 2014, when British Columbia's new *Wills, Estates and Succession Act*¹⁴³ came into force (at that point the survivorship provisions were moved to that Act,¹⁴⁴ and the title of British Columbia's presumption of death legislation changed from the *Survivorship and Presumption of Death Act* to the *Presumption of Death Act*).¹⁴⁵ The possibility of combining the provisions currently found in Manitoba's *Presumption of Death Act*, *Missing Persons Act*¹⁴⁶ and *Survivorship Act*,¹⁴⁷ or any two out of three of those statutes, is something that might be considered. Combining two or three of these statutes might facilitate the finding of and learning about the legislation applicable to missing persons, survivorship and presumption of death, given that these matters can be interrelated in some circumstances.

2. Register of Presumed Deaths

The presumption of death legislation in England and Wales, Northern Ireland, and Scotland require a register of presumed deaths to be maintained.¹⁴⁸ None of the presumption of death statutes of general application that have been enacted by Canada's provinces and territories require that such a register be kept, although some of the vital statistics legislation enacted by Canadian jurisdictions does specifically provide that an order declaring someone presumed dead may be used to register someone as officially dead for vital statistics purposes.¹⁴⁹ The Commission merely flags this issue as a measure that has been adopted elsewhere, and which might prove useful in terms of keeping track of missing persons who have been presumed dead.

¹⁴² See Saskatchewan's *Missing Persons and Presumption of Death Act*, *supra* note 6, found at Appendix D.

¹⁴³ See *Wills, Estates and Succession Act*, S.B.C. 2009, c. 13.

¹⁴⁴ *Ibid.* at sections 5 to 11.

¹⁴⁵ See British Columbia's Table of Legislative Changes, available online at:

<http://www.bclaws.ca/civix/document/id/complete/statreg/E31c96444a>. Also see information regarding the *Wills, Estates and Succession Act* available on the British Columbia Courthouse Library's website at:

<http://www.courthouselibrary.ca/training/HowToGuides/wills-resources/WESA.aspx>.

¹⁴⁶ See *supra* note 2.

¹⁴⁷ See *supra* note 1.

¹⁴⁸ See section 15 of the *Presumption of Death Act* 2013, *supra* note 17; section 15 of the *Presumption of Death Act (Northern Ireland)* 2009, *supra* note 16; and section 12 of the *Presumption of Death (Scotland) Act* (1977), *supra* note 15.

¹⁴⁹ See, for example, section 37 of Alberta's *Vital Statistics Act*, *supra* note 18, found at Appendix N to this report; section 20(3) of British Columbia's *Vital Statistics Act*, R.S.B.C. 1996, c. 479; and section 67 of the Northwest Territories' *Vital Statistics Act*, S.N.W.T. 2011, c. 34.

3. Effect of a Declaration of Presumption of Death Order on Legal Responsibility for Criminal Activity

The *Presumption of Death (Scotland) Act (1977)*¹⁵⁰ contains a unique provision. Section 3(4) of that Act states:

- 3(4) Where the missing person or any other person has committed any crime or offence, the responsibility of that person therefor shall not be affected by the circumstance that decree in an action of declarator has been granted if the missing person was in fact alive at the date specified in the decree as the date of death.

The Commission is of the view that there is no need to enact a similar section in Manitoba's *Presumption of Death Act* because this provision merely re-states what is already the law in Canada: if a person commits an offence after such time as an order declaring him or her presumed dead was erroneously made, he or she will still be held responsible under the law for committing the offence in question.

¹⁵⁰ See *supra* note 15.

CHAPTER 5: LIST OF RECOMMENDATIONS

Recommendation #1

Section 1 of Manitoba's Presumption of Death Act should be amended to add a definition of "interested person." The definition of "interested person" should be the same as the one found at section 1 of the Uniform Law Conference of Canada's Uniform Presumption of Death Act (1976), with the exception being that "(iii) the Public Guardian and Trustee" and "(iv) where there is a contract insuring an individual's life, an insurer" should be added to the list of those included as an "interested person." (page 18)

Recommendation #2

Section 2(1) of Manitoba's Presumption of Death Act should be amended to specify that an application for an order declaring someone to be presumed dead may only be made by an "interested person." (page 18)

Recommendation #3

Section 2(1) of Manitoba's Presumption of Death Act should be amended to read:

2(1) An interested person may, with notice to any other interested persons of whom the applicant is aware or to persons whom the court thinks appropriate or both, apply to the court for an order declaring someone to be presumed dead, and if the court is satisfied that ... (page 20)

Recommendation #4

Section 2(3) of the Presumption of Death Act should be repealed. (page 20)

Recommendation #5

Manitoba's Presumption of Death Act should be amended to allow an interested person, as well as any other person to whom notice of an application for an order of declaration of presumption of death has been provided, to file a statement of objection to the application with the court, within a prescribed time frame, before the order has been made. The new legislative provision should be modeled after section 17 of the Missing Persons and Presumption of Death Act, S.S. 2009, c. M-20.01. (page 22)

Recommendation #6

Manitoba's Presumption of Death Act should be amended to add a new section, section 2(4), to the Act. Section 2(4) should read as follows:

2(4) Any interested person may, with leave of the court, apply to the court for an order to vary, amend, confirm or revoke an order made under subsection (1). (page 22)

Recommendation #7

Manitoba's Presumption of Death Act should be amended to add provisions that create a framework for the distribution of the property of those subject to an order declaring them to be presumed dead. This framework should provide statutory protection from liability for personal representatives and insurance trustees who may be charged with distributing the property of these individuals. The new provisions should mirror those found in sections 3 to 5 of the Uniform Law Conference of Canada's Uniform Presumption of Death Act (1976) but with necessary amendments made for insurance trustees. In addition, the words "presumed to be dead believes or there are reasonable grounds for him to believe," found in section 3 of Uniform Law Conference of Canada's Uniform Presumption of Death Act (1976) Act, should be replaced by the words "has reasonable grounds to believe." (page 30)

Recommendation #8

Manitoba's Presumption of Death Act should be amended to allow for an appeal from a declaration of presumption of death order to the Court of Appeal. (page 31)

Recommendation #9

Manitoba's Presumption of Death Act should be amended to add provisions for absent guardianship, as has been done in Saskatchewan's Missing Persons and Presumption of Death Act, Ontario's Absentees Act, New Brunswick's Presumption of Death Act and the Guardianship and Administration Act 1986 of Victoria, Australia. (page 33)

Recommendation #10

Section 3(2) of Manitoba's Presumption of Death Act should be repealed. (page 34)

Recommendation #11

Manitoba's Insurance Act should be amended to provide that an order declaring a person to be presumed dead, made under the Presumption of Death Act, functions as a declaration of presumption of death order for life insurance purposes and for the purposes of accidental death benefit claims made under accident and sickness insurance policies, unless the court expressly exempts the order from being used for such purposes. (page 35)

Recommendation #12

Manitoba's Presumption of Death Act should be amended to stipulate that declaration of presumption of death orders issued by courts in other Canadian jurisdictions shall be recognized in accordance with the process found in the Enforcement of Canadian Judgements Act, C.C.S.M. c. E116, and that declaration of presumption of death orders issued by tribunals in non-Canadian jurisdictions shall be recognized if made pursuant to legislation substantially similar to the provisions of Manitoba's Presumption of Death Act. (page 36)

This is a report pursuant to section 15 of the *Law Reform Commission Act*, C.C.S.M. c. L95, signed this 15th day of October, 2015.*

“Original Signed by”

Cameron Harvey, President

“Original Signed by”

Jacqueline Collins, Commissioner

“Original Signed by”

Michelle Gallant, Commissioner

“Original Signed by”

Myrna Phillips, Commissioner

* This Report was largely prepared prior to the promulgation of Manitoba Order in Council 000401/2015 on 30 September 2015, which served to appoint Sacha Paul and the Honourable Justice Lori T. Spivak, as commissioners of the Manitoba Law Reform Commission. As a consequence, only the four commissioners whose appointments were in effect prior to 30 September 2015 and who were reappointed as commissioners by the 30 September 2015 Order in Council have signed the original report. Manitoba Order in Council 000401/2015 is available online at: <http://oic.gov.mb.ca/OICDocs/2015/09/Justice%20&%20Attorney%20General.150930.Law%20Reform%20Commission%20Act.4012015.pdf>.

APPENDIX A – MANITOBA'S PRESUMPTION OF DEATH ACT

The Presumption of Death Act, C.C.S.M. P120

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Manitoba, enacts as follows:

Definition

1. In this Act "court" means the Court of Queen's Bench.

Order for presumption of death

- 2(1) Upon application if the court is satisfied that
- (a) a person has been absent and not heard of or from by the applicant, or to the knowledge of the applicant by any other person, since a day named;
 - (b) the applicant has no reason to believe that the person is living; and
 - (c) reasonable grounds exist for supposing that the person is dead;
- the court may make an order declaring that the person shall be presumed to be dead for all purposes, or for such purposes only as are specified in the order.

Date of presumed death

- 2(2) The order shall state the date on which the person is presumed to have died or the date after which the person is presumed not to be living.

Notice of application

- 2(3) An order shall not be made under this Act unless:
- (a) in the case of an order declaring that a person shall be presumed dead for all purposes, notice of the application has been given by publication of an advertisement in a newspaper having general circulation in the area in which the person was last known to reside, and in such other manner and to such persons as the court to which the application is made may direct; and
 - (b) in the case of any other order, notice of the application has been given in such manner and to such persons as the court to which the application is made may direct.

Certified copy of order as evidence

3(1) Subject to subsection (2), an order, or a certified copy thereof, declaring that a person is presumed dead for all purposes is proof of death in all matters requiring proof of death; and, subject to subsection (2), an order, or a certified copy thereof, declaring that a person is presumed dead for the purposes specified in the order is proof of death in all matters requiring proof of death which relate to those purposes.

Exception for life insurance

3(2) An order made under this Act is not proof, for the purpose of a policy of insurance to which Part V of The Insurance Act applies, of the death of the person whose life is insured under the policy of insurance.

APPENDIX B - ULCC -- PRESUMPTION OF DEATH ACT OF 1960 AND UNIFORM PRESUMPTION OF DEATH ACT (1976)

ULCC's Presumption of Death Act of 1960

1. This Act may be cited as the *Presumption of Death Act*.
2. In this Act, unless the context otherwise requires, "court" means the ... Court or a Judge thereof.
- 3(1) Upon application to be heard after such notice as the court deems proper, the court, if satisfied that,
 - (a) A person has been absent and not heard of or from by the applicant, or to the knowledge of the applicant by any other person, since a day named; and
 - (b) the applicant has no reason to believe that the person is living; and
 - (c) reasonable grounds exist for supposing that the person is dead,may make an order declaring that the person shall be presumed to be dead for all purposes, or for such purposes only as are specified in the order.
- (2) The order shall state the date on which the person is presumed to have died or the date after which the person is presumed not to be living.
4. An order, or a certified copy thereof, declaring that a person is presumed dead for all purposes or for the purposes specified in the order is proof of death in all matters requiring proof of death.

ULCC's Uniform Presumption of Death Act (1976)

Interpretation

1. In this Act
 - (a) "court" means the (name of superior court of the jurisdiction);
 - (b) "interested person" means any person who is or would be affected by an order made under this Act and includes,
 - (i) The next of kin of the person in respect of whom an order is made or applied for, and
 - (ii) A person who holds property of the person in respect of whom an order is made or applied for.

Date of presumed death

2.(1) Where, upon the application of an interested person by originating notice of motion, the court is satisfied that

- (a) a person has been absent and not heard of or from by the applicant, or to the knowledge of the applicant by any other person, since a day named;
- (b) the applicant has no reason to believe that the person is living; and
- (c) reasonable grounds exist for supposing that the person is dead,

the court may make an order declaring that the person shall be presumed to be dead for all purposes, or for such purposes only as are specified in the order.

(2) An order made under subsection (1) shall state the date on which the person is presumed to have died.

Order to vary, amend, confirm or revoke

(3) Any interested person may, with leave of the court, apply to the court for an order to vary, amend, confirm or revoke an order made under subsection (1).

Certificate of order as evidence

(4) An order, or a certified copy thereof, declaring that a person shall be presumed to be death for all purposes or for the purposes specified in the order is proof of death in all matters requiring proof of death for such purposes.

Duty of personal representative

4. Where an order has been made declaring that person shall be presumed to be dead for all purposes or for the purpose of distributing his estate, and the personal representative of the person presumed to be dead believes or there are reasonable grounds for him to believe that the person is not in fact dead, the personal representative shall not thereafter deal with the estate or remaining estate unless the presumption of death is confirmed by an order made under section 2(3).

Distribution where in fact alive

4.(1) Where a person who is presumed to be dead is, in fact, alive, any distribution of his property that has been made in reliance upon an order made under section 2, and not in contravention of section 3, shall be deemed to be a final distribution and to be the property of the person to whom it has been distributed as against the person presumed to be dead.

Directions for preservation and return of property

(2) Where a person who is presumed to be dead is found by the court to be alive, the court may, upon the application of any interested person and subject to subsection (1), by order give such directions as the court considers appropriate respecting the property of the person found to be alive and its preservation and return.

Distribution where in fact dead

5. Where a person who is presumed to be dead is in fact found to be dead, any distribution of his property that has been made in reliance upon an order made under section 2 shall be deemed to be a final distribution and to be the property of the person to whom it has been distributed as against any person who would otherwise be entitled if the order made under section 2 has not been made.

Appeal

6. Any interested person may appeal an order made under this Act to the (*appropriate appellate court*).

APPENDIX C – SECTIONS 180 AND 186 TO 191 OF MANITOBA'S INSURANCE ACT

Insurance Act, C.C.S.M. c. 140

Proof of claim

180. Where an insurer receives sufficient evidence of

- (a) the happening of the event upon which insurance money becomes payable;
- (b) the age of the person whose life is insured;
- (c) the right of the claimant to receive payment; and
- (d) the name and age of the beneficiary, if there is a beneficiary;

it shall, within 30 days after receiving the evidence, pay the insurance money to the person entitled thereto.

Declaration as to sufficiency of proof

186. If an insurer admits the validity of the insurance but does not admit the sufficiency of the evidence required by section 180 and there is no other question in issue except a question under section 187, the insurer or the claimant may, before or after action is brought and upon at least 30 days' notice, apply to the court for a declaration as to the sufficiency of the evidence proved, and the court may make the declaration or may direct what further evidence is to be proved and on the provision of evidence may make the declaration or, in special circumstances, may dispense with further evidence and make the declaration.

Declaration as to presumption of death

187(1) If a claimant alleges that the person whose life is insured should be presumed to be dead by reason of his not having been heard of for seven years, and there is no other question in issue except a question under section 186, the insurer or the claimant may, before or after action is brought and upon at least 30 days' notice, apply to the court for a declaration as to presumption of the death and the court may make the declaration.

Content of declaration

187(2) A declaration of presumption of death made by the court under subsection (1) must contain particulars of the following information to the extent that those particulars have been established to the satisfaction of the court:

- (a) the full name of the person presumed dead, including maiden or married name if applicable;
- (b) the gender of the person presumed dead;
- (c) the place where death is presumed to have occurred;
- (d) the date on which death is presumed to have occurred;

(e) whether the presumed death was accidental.

Court may make order

188(1) On making a declaration under section 186 or section 187, the court may make any order respecting the payment of the insurance money and respecting costs that it considers just and a declaration, direction or order made under this subsection is binding on the applicant and on all persons to whom notice of the application has been given.

Payment under order

188(2) A payment made under an order made under subsection (1) discharges the insurer to the extent of the amount paid.

Stay of proceedings

189 Unless the court orders otherwise, an application made under section 186 or section 187 operates as a stay of any pending action with respect to the insurance money.

Order re further evidence

191 If the court finds that the evidence provided under section 180 is not sufficient or that a presumption of death is not established, it may order that the matters in issue be decided in an action brought or to be brought, or may make any other order it considers just respecting further evidence to be provided by the claimant, publication of advertisements, further inquiry or any other matter, or respecting costs.

APPENDIX D – BRITISH COLUMBIA'S *PRESUMPTION OF DEATH ACT*

Presumption of Death Act, R.S.B.C. 1996, c. 444

Definitions

1 In this Act:

"court" means the Supreme Court;

"interested person" means

- (a) any person who is or would be affected by an order made under this Act,
- (b) the next of kin of the person in respect of whom an order is made or for whom an order is applied, and
- (c) a person who holds property of the person in respect of whom an order is made or for whom an order is applied.

Repealed

2 [Repealed 2009-13-256.]

Presumption of death

3 (1) If, on the application of an interested person under the Supreme Court Civil Rules, the court is satisfied that

- (a) a person has been absent and not heard of or from by the applicant, or to the knowledge of the applicant by any other person, since a day named,
- (b) the applicant has no reason to believe that the person is living, and
- (c) reasonable grounds exist for supposing that the person is dead,

the court may make an order declaring that the person is presumed to be dead for all purposes, or for those purposes only as are specified in the order.

(2) An order made under subsection (1) must state the date on which the person is presumed to have died.

(3) Any interested person may, with leave of the court, apply to the court for an order to vary, amend, confirm or revoke an order made under subsection (1).

(4) An order, or a certified copy of an order, declaring that a person is presumed to be dead for all purposes or for the purposes specified in the order, is proof of death in all matters requiring proof of death for those purposes.

(5) The registrar of the court must forward to the registrar general under the *Vital Statistics Act* an order made under subsection (1) or (3) within 30 days of the entry of the order.

Duty of personal representative

- 4 If an order has been made declaring that a person is presumed to be dead for all purposes or for the purpose of distributing his or her estate, and the personal representative of the person presumed to be dead subsequently believes or there are reasonable grounds for the personal representative to believe that the person is not in fact dead, the personal representative must not deal after that with the estate or the remaining estate unless the presumption of death is confirmed by a further order made under section 3.

Status of property if deceased later found alive

- 5 (1) If a person who is presumed to be dead is, in fact, alive, any of his or her property that has been distributed in reliance on an order made under section 3, and not in contravention of section 4, is deemed to be a final distribution and to be the property of the person to whom it has been distributed as against the person presumed to be dead.

(2) Subject to subsection (1), if a person who is presumed to be dead is found by the court to be alive, the court may, on the application of any interested person, by order, give directions the court considers appropriate respecting the property of the person found to be alive and its preservation and return.

Status of property if deceased in fact dead

- 6 If a person who is presumed to be dead is, in fact, dead, any of his or her property that has been distributed in reliance on an order made under section 3 is deemed to be a final distribution and to be the property of the person to whom it has been distributed as against any person who would otherwise be entitled if the order made under section 3 had not been made.

Appeals

- 7 Any interested person may appeal an order made under this Act to the Court of Appeal.

APPENDIX E – SASKATCHEWAN'S MISSING PERSONS AND PRESUMPTION OF DEATH ACT

The Missing Persons and Presumption of Death Act
S.S. 2009, c M-20.01

PART I Preliminary Matters

Short title

1. This Act may be cited as The Missing Persons and Presumption of Death Act.

Interpretation

2. In this Act:

(a) "capacity" means the ability:

- (i) to understand information relevant to making a decision; and
- (ii) to appreciate the reasonably foreseeable consequences of making or not making a decision mentioned in subclause (i);

(b) "court" means the Court of Queen's Bench for Saskatchewan;

(c) "missing person" means a person who:

- (i) has not been heard from or of, by the persons who would likely hear from the person, for at least three months and whose whereabouts are unknown despite reasonable efforts to locate the person; or
- (ii) has been missing for less than three months, but who is otherwise a missing person within the meaning of subclause (i), and who is declared by the court to be a missing person, on an application accompanied by evidence to the satisfaction of the court that there is urgent need for a property guardian to be appointed pursuant to this Act for the preservation of the estate or the support of the dependants of that person;

(d) "prescribed" means prescribed in the regulations;

(e) "property guardian" means:

- (i) a property guardian of a missing person's estate appointed by the court pursuant to this Act; or
- (ii) in the circumstances set out in section 7, the public guardian and trustee;

(f) "public guardian and trustee" means the corporation sole of the Public Guardian and Trustee for Saskatchewan continued pursuant to section 3 of The Public Guardian and Trustee Act;

(g) "spouse" means:

- (i) the legally married spouse of the missing person; or
- (ii) a person, including a person less than 18 years of age, who has cohabited with the missing person as spouses continuously for a period of not less than two years.

PART II

Declaration of Missing Person and Appointment of Property Guardian

Persons who may apply for declaration and appointment

3.(1) Subject to subsection (3), the persons entitled to apply to the court for an order declaring someone a missing person and appointing a property guardian are the following, in order of priority:

- (a) the spouse of the person alleged to be missing;
- (b) a child of the person alleged to be missing;
- (c) a parent or legal guardian of the person alleged to be missing;
- (d) a brother or sister of the person alleged to be missing;
- (e) a grandchild, great-grandchild or grandparent of the person alleged to be missing;
- (f) a nephew, niece, uncle or aunt of the person alleged to be missing;
- (g) any other person who, in the opinion of the court, has a sufficient interest in the estate of the person alleged to be missing;
- (h) the public guardian and trustee.

(2) An application pursuant to this section must be made in the prescribed form.

(3) If the court is satisfied that it is in the best interests of the estate of the person alleged to be missing, the court may accept and act on an application from a person mentioned in subsection (1) notwithstanding that another person mentioned in that subsection may be higher in the order of priority set out in that subsection.

Notice of application

- 4(1) In this section and in sections 16 and 22, "nearest relative" means:
- (a) the spouse of the person alleged to be missing; and
 - (b) an individual mentioned in clauses 3(1)(b) to (f), other than the applicant, who is over 18 years of age.
- (2) A copy of every application pursuant to section 3 must be given to:
- (a) if the application is not made by the public guardian and trustee, the public guardian and trustee;
 - (b) the nearest relative of the person alleged to be missing who is highest in the order of priority set out in clauses 3(1)(a) to (f) unless that nearest relative has consented in the prescribed form to the application; and
 - (c) any other person that the court considers necessary.

Statement of objection

- 5(1) A person who is provided with a copy of the application pursuant to section 4 may, within 10 days after the last person is served, file a statement of objection with the court setting out the reasons he or she objects to the application.
- (2) Any person who claims to have a sufficient interest in the estate of the person alleged to be missing may file a statement of objection with the court within 10 days after the last person is served pursuant to section 4.
- (3) A statement of objection mentioned in subsections (1) and (2) is to be in the prescribed form.
- (4) A person filing a statement of objection pursuant to this section shall serve a copy of it on the applicant, the persons mentioned in section 4 and any person who consented in the prescribed form to the order requested in the application.

Order of declaration and appointment

- 6(1) On an application pursuant to section 3, the court may make an order pursuant to this section if the court is satisfied that:
- (a) the person who is the subject of the application:
 - (i) is a missing person; and
 - (ii) has property in Saskatchewan; and

- (b) it is advisable that a property guardian be appointed for the estate of the person who is the subject of the application.
- (2) In the circumstances mentioned in subsection (1), the court may make an order:
 - (a) declaring the person who is the subject of the application as a missing person; and
 - (b) appointing the applicant, or any other person that the court considers appropriate, as the property guardian for the estate of the missing person.
- (3) The court may impose any terms and conditions that the court considers appropriate on a property guardian, including terms and conditions respecting security to be provided by the property guardian.

When public guardian and trustee may act as property guardian

- 7(1) The public guardian and trustee may do the things mentioned in subsection (2) if:
 - (a) the value of a person's estate is less than the prescribed amount and the public guardian and trustee is satisfied that the person is a missing person and has property in Saskatchewan; or
 - (b) the public guardian and trustee is satisfied that:
 - (i) the person is a missing person;
 - (ii) a property guardian has not been appointed pursuant to this Act; and
 - (iii) it is necessary or appropriate to take possession of the person's property for the purpose of preserving and protecting that property.
- (2) In the circumstances mentioned in subsection (1), the public guardian and trustee:
 - (a) may exercise the powers conferred on a property guardian pursuant to this Act with respect to the estate of the person mentioned in subsection (1) without being required to apply to the court to be appointed as a property guardian; and
 - (b) if the public guardian and trustee acts pursuant to this section, shall fulfil the responsibilities imposed by this Act on a property guardian with respect to the estate of the person mentioned in subsection (1).
- (3) If the public guardian and trustee acts pursuant to this section with respect to a person's estate, the public guardian and trustee is deemed to be the property guardian of that person's estate as if the public guardian and trustee had been appointed as property guardian and as if the person had been declared a missing person.
- (4) If the public guardian and trustee acts pursuant to this section with respect to a person's estate, the public guardian and trustee may:

- (a) sign under seal a notice, in the prescribed form, indicating that he or she is acting as property guardian pursuant to the authority of this section; and
 - (b) after preparing a notice pursuant to clause (a) and without being required to obtain an order of the court pursuant to section 8, require any person or any public body, including the Crown, to provide the public guardian and trustee with any information, including the information mentioned in subsection 8(4), with respect to the missing person that is within the knowledge of, or is in any record in the possession or control of, the person or public body.
- (5) A notice prepared pursuant to subsection (4) is deemed to be, in the absence of evidence to the contrary, proof of the facts stated in the notice.

Access to information

8(1) In this section, "health information" means personal health information as defined in The Health Information Protection Act and includes any additional prescribed information.

(2) A judge of the court may make an order pursuant to this section if, on an ex parte application, the judge is satisfied that the applicant requires an order pursuant to this section in aid of all or any of the following:

- (a) an application to obtain an order appointing the person as a property guardian;
 - (b) an attempt to locate a person who has been reported as missing to a police service within the meaning of *The Police Act*, 1990 or to the Royal Canadian Mounted Police;
 - (c) an application to deal with any other matter governed by this Act that the judge considers appropriate.
- (3) An application for an order pursuant to this section:
- (a) must be made by a person mentioned in subsection 3(1) or a member of a police service within the meaning of *The Police Act*, 1990 or of the Royal Canadian Mounted Police; and
 - (b) must be in the prescribed form.

(4) In the circumstances mentioned in subsection (2) and notwithstanding any other Act or law restricting the disclosure of the information, the judge of the court may order any person or any public body, including the Crown, to provide the applicant or any other person whom the judge considers appropriate with any of the following information with respect to the missing person or the person mentioned in clause (2)(b) that is within the knowledge of, or is in any record in the possession or control of, the person or public body:

- (a) information respecting finances;
- (b) information respecting any accounts and transactions;
- (c) telephone or electronic communication records;
- (d) health information;
- (e) identification information, including a photograph
- (f) any other information that the judge considers appropriate.

Inventory of estate

9(1) The property guardian shall, at the time of the application or within six months after being appointed, provide the local registrar of the court and the public guardian and trustee with an accurate inventory of the estate of the missing person, so far as this information has come to the knowledge of the property guardian, that:

- (a) states the income and profits of the estate of the missing person; and
- (b) sets out the assets, debts and credits of the missing person.

(2) An inventory required pursuant to this section must be in the prescribed form.

(3) If property belonging to the estate of a missing person is discovered after an inventory has been provided pursuant to subsection (1), the property guardian shall provide the local registrar of the court and the public guardian and trustee with an accurate inventory of the estate immediately on the property being discovered.

(4) The property guardian shall verify by affidavit every inventory required pursuant to this section.

(5) The public guardian and trustee may carry out an investigation to ensure the accuracy of an inventory provided pursuant to this section.

(6) If a property guardian does not provide an inventory pursuant to subsection (1) or (3), the public guardian and trustee may request that the court review the order appointing the property guardian and make any further order that the court considers appropriate.

Powers and duties of property guardian

10(1) A property guardian may:

(a) do anything respecting the estate of the missing person that the missing person could do except:

- (i) make a will; or
- (ii) change an election or designation made by the missing person; and

(b) sign documents and do all things necessary to give effect to the authority vested in the property guardian.

(2) On application by the property guardian or any other person whom the court considers appropriate, the court may authorize the sale, lease or other disposition of the missing person's property if the court is satisfied that the sale, lease or other disposition is required in the interests of the estate of the missing person.

(3) Subject to any direction of the court, a property guardian has authority to spend moneys out of the estate of the missing person for either or both of the following purposes:

(a) locating the missing person;

(b) determining if the missing person is alive or dead.

(4) Without being required to obtain an order of the court pursuant to section 8, a property guardian may require any person or any public body, including the Crown, to provide the property guardian with any information, including the information mentioned in subsection 8(4), with respect to the missing person that is within the knowledge of, or is in any record in the possession or control of, the person or public body.

(5) A property guardian may pay, out of the estate of the missing person, any amounts the property guardian considers appropriate or necessary towards the maintenance or education of the missing person's dependants.

Filing of order in Land Titles Registry

11(1) If, in the opinion of a property guardian, the missing person has an interest in a title to land or in a registered interest in land, the property guardian shall register the following in the Land Titles Registry:

(a) a notice of his or her authority to act in the prescribed form;

(b) a copy, certified by a local registrar of the court to be a true copy, of the order appointing him or her to act as a property guardian.

(2) If the public guardian and trustee is acting pursuant to section 7 with respect to a person's estate and, in the opinion of the public guardian and trustee, that person has an interest in a title to land or in a registered interest in land, the public guardian and trustee shall register the following in the Land Titles Registry:

- (a) a notice of the public guardian and trustee's authority to act in the prescribed form;
 - (b) a copy of the notice issued pursuant to clause 7(4)(a).
- (3) The notice mentioned in clause (1)(a) or (2)(a) is to contain a description of the titles and registered interests with respect to which the notice is to be registered.
- (4) On receipt of the documents mentioned in subsection (1) or (2), the Registrar of Titles shall register the notice mentioned in clause (1)(a) or (2)(a), as the case may be, against all titles and interests described in the notice.
- (5) After a notice is registered pursuant to subsection (4), any application to transfer title or to amend, assign or discharge an interest with respect to which the registered notice applies must be authorized by the property guardian in writing.
- (6) Subsection (5) does not apply to:
- (a) an application to transfer title or to amend, assign or discharge an interest based on a court order; or
 - (b) an application to register a transfer of title if the consent of the registered owner is not required pursuant to The Land Titles Act, 2000.

Withdrawal or amended notice

12(1) A property guardian shall apply to the Registrar of Titles, in the prescribed form, to discharge a notice registered pursuant to subsection 11(1) or to register an amended notice containing the alterations and corrections to the notice registered pursuant to subsection 11(1) if:

- (a) the appointment for which the notice was registered pursuant to subsection 11(1) has been varied;
 - (b) the missing person with respect to whom the notice was registered pursuant to subsection 11(1) does not have an interest in the title or interest, or in any specified part of the title or interest, described in the notice; or
 - (c) an error was made in the notice registered pursuant to subsection 11(1).¹⁰
- (2) The public guardian and trustee shall apply to the Registrar of Titles, in the prescribed form, to discharge a notice registered pursuant to subsection 11(2) or to register an amended notice containing the alterations and corrections to the notice registered pursuant to subsection 11(2) if:

(a) the person with respect to whom the notice was registered pursuant to subsection 11(2) does not have an interest in the title or interest, or in any specified part of the title or interest, described in the notice; or

(b) an error was made in the notice registered pursuant to subsection 11(2).

(3) If there is a transfer of title or an assignment of an interest that is the subject of a notice mentioned in subsection 11(1) and the transfer or assignment is in accordance with the order mentioned in clause 11(1)(b), registration of the transfer or assignment in the Land Titles Registry is deemed to be a discharge of that notice respecting the title transferred or interest assigned.

(4) If there is a transfer of title or an assignment of an interest that is the subject of a notice mentioned in subsection 11(2) and the transfer or assignment is in accordance with the notice mentioned in clause 11(2)(b), registration of the transfer or assignment in the Land Titles Registry is deemed to be a discharge of that notice respecting the title transferred or interest assigned.

Discharge of property guardian

13(1) Any of the following may apply to the court for an order to discharge a property guardian:

(a) if the person with respect to whose estate the property guardian was appointed ceases to be a missing person, the person;

(b) a person having, in the opinion of the court, a sufficient interest in the estate of the missing person;

(c) the public guardian and trustee;

(d) the property guardian.

(2) On an application to the court by a person mentioned in subsection (1), the court may discharge the property guardian if the court is satisfied that:

(a) the person with respect to whose estate the property guardian was appointed has ceased to be a missing person; or

(b) the property guardian:

(i) is unable or unwilling to act or continue to act;

(ii) fails to act in accordance with an order pursuant to this Act;

(iii) acts in an improper manner or in a manner that has endangered or that may endanger the estate of the missing person;

(iv) is not a suitable person to act as a property guardian; or

(v) lacks capacity.

(3) Before discharging a property guardian pursuant to this section, the court may make an order requiring the property guardian to file and pass the property guardian's accounts in accordance with this Act.

(4) The court may appoint the public guardian and trustee as the property guardian if:

(a) the property guardian has been discharged;

(b) in the opinion of the court:

- (i) the estate is still in need of a property guardian; and
- (ii) no application for another order to appoint a property guardian pursuant to this Act has been made; and

(c) the public guardian and trustee consents in writing to the appointment.

Death of property guardian

14(1) If a property guardian dies without a will, the public guardian and trustee may assume the position of property guardian and exercise the powers of the property guardian until a new property guardian is appointed.

(2) If a property guardian dies with a will, the executor of the deceased property guardian may assume the position of property guardian and exercise the powers of the property guardian until a new property guardian is appointed.

(3) Immediately on assuming the position of property guardian in accordance with subsection (2), the executor shall give written notice of that fact to the public guardian and trustee.

PART III Presumption of Death

Order re presumption of death

15.(1) Any of the persons mentioned in subsection 3(1) may apply for an order pursuant to this section declaring that the person who is the subject of the application is presumed to be dead.

(2) An application pursuant to this section must be made in the prescribed form.

(3) Subject to subsection (4), on an application pursuant to this section, the court may make an order declaring that the person who is the subject of the application is presumed to be dead for all purposes or only for those purposes specified in the order if the court is satisfied that:

- (a) the person who is the subject of the application has been absent and not been heard from or of by the applicant, or to the knowledge of the applicant by any other person, since a day named in the application;
 - (b) the applicant has no reason to believe that the person is living; and
 - (c) reasonable grounds exist for supposing that the person is dead.
- (4) An order made pursuant to subsection (3) does not apply for the purpose of:
 - (a) section 24 of *The Marriage Act*, 1995; or
 - (b) section 172 of *The Saskatchewan Insurance Act*.
- (5) An order made pursuant to this section must state the date on which the person who is the subject of the order is presumed to have died.
- (6) An order, or a certified copy of an order, made pursuant to this section declaring that a person is presumed to be dead for all purposes or for the purposes specified in the order is proof of death in all matters requiring proof of death for those purposes.
- (7) The local registrar of the court shall forward to the Registrar of Vital Statistics an order made pursuant to this section within 30 days after the date the order was made.
- (8) Without limiting the generality of clause (3)(c), in a proceeding pursuant to this section, a court may consider as reasonable grounds to suppose that person is dead evidence that:
 - (a) for a period of seven years or more a person has been missing; and
 - (b) the applicant has made reasonable efforts to locate that person.

Notice of application

- 16. A copy of every application pursuant to section 15 must be given to:
 - (a) if the application is not made by a property guardian of the estate of the person who is the subject of the application, the property guardian;
 - (b) if the application is not made by the public guardian and trustee, the public guardian and trustee;
 - (c) if a property guardian has not been appointed, a property guardian appointed pursuant to *The Adult Guardianship and Co-decision-making Act*, or an attorney appointed pursuant to *The Powers of Attorney Act*, 2002, for the person who is the subject of the application;

(d) the nearest relative of the person who is the subject of the application who is highest in the order of priority set out in clauses 3(1)(a) to (f) unless that nearest relative has consented in the prescribed form to the application; and

(e) any other person that the court considers necessary.

Statement of objection

17.(1) A person who is provided with a copy of the application pursuant to section 16 may, within 10 days after the last person is served, file a statement of objection with the court setting out the reasons he or she objects to the application.

(2) Any person who claims to have a sufficient interest in the estate of the person who is the subject of the application may file a statement of objection with the court within 10 days after the last person is served pursuant to section 16.

(3) A statement of objection mentioned in subsections (1) and (2) is to be in the prescribed form.

(4) A person filing a statement of objection pursuant to this section shall serve a copy of it on the applicant, the persons mentioned in section 16 and any person who consented in the prescribed form to the order requested in the application.

Duty of executor or administrator

18. If an order has been made declaring that a person is presumed to be dead for all purposes or for the purpose of distributing his or her estate, and the executor or administrator of the estate of the person presumed to be dead subsequently believes or there are reasonable grounds for the executor or administrator to believe that the person is not dead, the executor or administrator shall not, after the time that the belief or reasonable grounds arise, deal with the estate or the remaining estate unless the presumption of death is confirmed by a further order made pursuant to section 15.

Effect of presumption on property guardian and attorney

19. On the making of an order pursuant to section 15 presuming the death of a person, the following are terminated:

(a) the powers of a property guardian;

(b) if a property guardian has not been appointed, the powers of a property guardian appointed pursuant to *The Adult Guardianship and Co-decision-making Act* for that person;

- (c) if a property guardian has not been appointed, the powers of any attorney appointed by that person pursuant to *The Powers of Attorney Act*, 2002.

Status of property if person later found alive

20.(1) Subject to subsection (2), if a person who is presumed to be dead is, in fact, alive, any distribution of his or her property made in reliance on an order made pursuant to this Act, and, in the case of an order made pursuant to this Part not in contravention of section 15, is deemed to be a final distribution and to be the property of the person to whom it has been distributed as against the person presumed to be dead.

(2) If a person who is presumed to be dead is found by the court to be alive, the court may, on the application of any interested person, by order, give any directions that the court considers appropriate respecting the property of the person found to be alive and its preservation and return.

****[There is a Part IV which deals further with missing persons declarations.]**

APPENDIX F – ONTARIO'S *DECLARATION OF DEATH ACT*

Declaration of Death Act, S.O. 2002, c 14

Definitions

1. In this Act,

“interested person” means any person who is or would be affected by an order declaring that an individual is dead, including,

- (a) a person named as executor or estate trustee in the individual's will,
- (b) a person who may be entitled to apply to be appointed administrator of the individual's estate on intestacy,
- (c) the individual's spouse,
- (d) the individual's next of kin,
- (e) the individual's guardian or attorney for personal care or property under the *Substitute Decisions Act* 1992,
- (f) a person who is in possession of property owned by the individual,
- (g) if there is a contract of life insurance or group insurance insuring the individual's life,
 - (i) the insurer, and
 - (ii) any potential claimant under the contract, and
- (h) if the individual has been declared an absentee under the *Absentees Act*, the committee of his or her estate; (“personne intéressée”)

“spouse” means,

- (a) a spouse as defined in section 1 of the *Family Law Act*, or
- (b) either of two persons who live together in a conjugal relationship outside marriage. (“conjoint”).

Order re declaration of death

2. (1) An interested person may apply to the Superior Court of Justice, with notice to any other interested persons of whom the applicant is aware, for an order under subsection (3).

Notice

(2) Notice under subsection (1),

- (a) if given by or to an insurer, shall be given at least 30 days before the application to court is made;
- (b) if not given by or to an insurer, shall be given as provided by the rules of court.

Power of court

(3) The court may make an order declaring that an individual has died if the court is satisfied that either subsection (4) or (5) applies.

Disappearance in circumstances of peril

(4) This subsection applies if,

- (a) the individual has disappeared in circumstances of peril;
- (b) the applicant has not heard of or from the individual since the disappearance;
- (c) to the applicant's knowledge, after making reasonable inquiries, no other person has heard of or from the individual since the disappearance;
- (d) the applicant has no reason to believe that the individual is alive; and
- (e) there is sufficient evidence to find that the individual is dead.

Seven-year absence

(5) This subsection applies if,

- (a) the individual has been absent for at least seven years;
- (b) the applicant has not heard of or from the individual during the seven-year period;
- (c) to the applicant's knowledge, after making reasonable inquiries, no other person has heard of or from the individual during the seven-year period;
- (d) the applicant has no reason to believe that the individual is alive; and
- (e) there is sufficient evidence to find that the individual is dead.

Scope of order

- (6) The declaration of death applies for all purposes unless the court,
- (a) determines that it should apply only for certain purposes; and
 - (b) specifies those purposes in the order.

Same

- (7) The declaration of death is not binding on an interested person who did not have notice of the application.

Date of death

- (8) The order shall state the date of death, which shall be,
- (a) the date upon which the evidence suggests the person died, if subsection (4) applies;
or
 - (b) the date of the application, if subsection (5) applies.

Same

- (9) The order may state a date of death other than that required by subsection (8) if the court is of the opinion that it would be just to do so in the circumstances and that it would not cause inconvenience or hardship to any of the interested persons.

Order as evidence

- (10) Despite any other Act, the order or a copy certified by the court is proof of the individual's death for the purposes for which it applies under subsection (6).

Order under *Absentees Act*

3. If, on an application under section 2, the court is not satisfied that there is sufficient evidence to justify an order declaring an individual to be dead, the court may make an order under the *Absentees Act*.

Motion to amend, confirm or revoke order

- 4.(1) An interested person may, with notice to any other interested persons of whom the person making the motion is aware, move for an order amending, confirming or revoking an order made under section 2 if the person making the motion did not have notice of the application to make the order.

Same

(2) An interested person may, with leave of the court and with notice to any other interested persons of whom the person making the motion is aware, move for an order amending, confirming or revoking an order made under section 2 if new evidence or a change in circumstances justify reconsidering the matter.

Amendment re scope

(3) An interested person may, with leave of the court and with notice to any other interested persons of whom the person making the motion is aware, move for an order modifying the scope of an order made under section 2.

Motion re order under this section

(4) An interested person may also make a motion under subsection (1), (2) or (3) in respect of an order previously made under this section.

Notice

(5) Notice under subsection (1), (2) or (3),

(a) if given by or to an insurer, shall be given at least 30 days before the motion is made;

(b) if not given by or to an insurer, shall be given as provided by the rules of court.

Power of court

(6) The court may make an order confirming, amending or revoking the order and subsections 2(3), (4), (5), (6), (7), (8), (9) and (10) and section 3 apply, with necessary modifications, to an order made under this section.

Preservation or return of property

(7) If the court amends or revokes the order, it may also make any order it considers appropriate for the preservation or return of property, including an order under subsection 6(3).

References to s. 2 orders

(8) A reference in another section of this Act or in any other Act to an order made under section 2 shall be deemed to include an order made under this section.

Duty of personal representative

5. If an order that applies for the purpose of dealing with an individual's estate has been made under section 2 but the individual's personal representative has reasonable grounds to believe that the individual is not in fact dead, the personal representative shall take no further steps to administer the estate unless the death is confirmed by an order made under section 4.

Effect of distribution if individual in fact alive

6.(1) Subject to subsections (2), (3), (5) and (6), if an order that applies for the purpose of dealing with an individual's estate has been made under section 2 and all or part of the estate has been distributed accordingly, the distribution is final even if the individual is afterwards discovered to be alive, and the individual is not entitled to recover the distributed property.

Exception

(2) Subsection (1) does not apply in respect of a distribution that is made when section 5 applies.

Power of court

(3) In the circumstances described in subsection (1), the court may, if it is of the opinion that it would be just to do so, make an order requiring a person to whom property was distributed to reconvey all or part of it to the individual or to pay a specified amount to the individual.

Matters to be considered

(4) In deciding whether to make an order under subsection (3), the court shall consider all the circumstances, including any inconvenience or hardship to the person subject to the order.

Effect of reconveyance

(5) Property that is reconveyed under an order made under subsection (3) shall be deemed not to have been distributed.

Same, payment

(6) Money that is paid under an order made under subsection (3) shall be deemed to have been the individual's property before the distribution.

Undistributed property

(7) Property that has not been distributed when the individual is discovered to be alive,

- (a) remains the individual's property;
- (b) is held in trust under the *Trustee Act*; and

- (c) shall be returned as the court directs.

Payment, distribution under order discharges duty

7. A payment of money or distribution of property made pursuant to an order made under this Act discharges the person who made the payment or distribution to the extent of the amount paid or the value of the property distributed.

Appeals

8. Any interested person may appeal an order made under this Act to the Divisional Court.

APPENDIX G – NEW BRUNSWICK'S *PRESUMPTION OF DEATH ACT*

Presumption of Death Act, SNB 2012, c. 110

Her Majesty, by and with the advice and consent of the Legislative Assembly of New Brunswick, enacts as follows:

1. In this Act "Court" means The Court of Queen's Bench of New Brunswick and includes any Judge thereof.

2.(1) Upon application after such notice as the Court considers proper, the Court if satisfied that

- (a) a person has been absent and not heard of or from by the applicant, or to the knowledge of the applicant by any other person, since a day named
- (b) the applicant has no reason to believe that the person is living,
- (c) reasonable grounds exist for presuming that the person is dead, and
- (d) the applicant has a sufficient reason for requesting an order under this section,

may make an order declaring that the person is presumed dead for all purposes or for such purposes only as are specified in the order.

2.(2) The order referred to in subsection (1) shall state the date on which the person is presumed to have died or the date after which the person is presumed to be dead.

3.(1) Upon application after such notice as the Court considers proper, the Court, if satisfied that

- (a) a person has been absent and not heard of or from by the applicant, or to the knowledge of the applicant by any other person, since a day named,
- (b) there is insufficient evidence to justify an order under section 2,
- (c) the person has property in New Brunswick, and
- (d) the person should be declared to be an absentee for the purpose of managing his property, having regard to the preservation of the property and its efficient use in satisfying his obligation.

may make an order declaring the person to be an absentee and in the order may

- (e) provide for the custody, due care and management of his property,

(f) appoint a committee of one or more persons for the purpose of paragraph (e), and

(g) authorize the sale, lease or other disposition of the property.

3.(2) Where an application has been made under subsection 2(1), the Court may, with the concurrence of the applicant, treat the application as an application under subsection (1).

3.(3) The powers and duties of the Court and a committee with respect to the estate of an absentee are the same, *mutatis mutandis*, as those of a court and a committee respectively under the *Infirm Persons Act*, but the Court may relieve the committee from the requirements of that Act respecting the provision of a bond.

3.(4) Subject to the direction of the Court, a committee appointed under this Act has authority to expend money out of the estate of an absentee for the purpose of endeavouring to trace his whereabouts and to ascertain whether he is alive or dead.

3.(5) Upon application after such notice as the Court considers proper, the Court, if satisfied that a person declared to be an absentee has ceased to be an absentee, may make an order so declaring and superseding, vacating and setting aside the order declaring him to be an absentee for all purposes except as to acts or things done respecting the estate of the absentee while the order was in force.

4. A person aggrieved or affected by an order made under this Act may apply for an order to replace, vary, amend or terminate such order.

5.(1) An order, or a copy thereof, certified by the Registrar or a deputy registrar, declaring that a person is presumed dead for all purposes or for the purposes specified in the order is proof of death in all matters requiring proof of death.

5.(2) An order made under subsection 2(1) is not proof of the death of a person whose life is insured under a policy of insurance to which Part V of the *Insurance Act* applies for the purpose of claiming under that policy of insurance.

6.(1) Subject to subsections (2) and (3), where an order has been made declaring that a person is presumed dead for all purposes or for the purpose of distributing his estate and

(a) the estate, or a portion thereof, has been distributed in accordance with the law governing the same, and

(b) it is later discovered that the person is not in fact dead,

any estate distributed shall be deemed to be a final distribution and to be the property of the person to whom it is distributed as against the person presumed dead, and is not subject to recovery by that person.

6.(2) In circumstances described in subsection (1), the Court may order a person to whom any estate has been distributed to reconvey to the owner the whole or a specified portion of the estate in his possession at the time of the order, or to pay to the owner a specified amount representing the value of the estate distributed to him or a portion thereof if, in the opinion of the Court, having regard to the circumstances of the case, including any inconvenience or hardship that would be imposed upon the person subject to the order, the making of such an order would be just.

6.(3) Where the whole or a portion of the estate is reconveyed, or an amount paid, to a person pursuant to an order under subsection (2),

(a) any estate reconveyed shall be deemed not to have been distributed, and

(b) any amount paid shall be deemed to have been the property of that person immediately prior to the distribution.

6.(4) Any estate referred to in subsection (1) not distributed at the time it is discovered that the person presumed dead is not in fact dead continues to be the property of that person and is to be returned to that person upon such terms and conditions as the Court may direct.

6.(5) The person holding any estate referred to in subsection (4) shall be deemed to be a trustee of the estate within the meaning of the *Trustees Act* until such time as the Court directs otherwise.

6.(6) If the person distributing the estate of a person presumed dead under an order made under this Act has reason to believe that the person is or may, in fact, be alive, he shall cease the distribution and apply to the Court for directions.

APPENDIX H – NOVA SCOTIA'S *PRESUMPTION OF DEATH ACT*

Presumption of Death Act, RSNS 1989, c 354

Short title

1. This Act may be cited as the *Presumption of Death Act*.

Interpretation

2. In this Act

(a) "Court" means the Trial Division of the Supreme Court of Nova Scotia or a judge thereof;

(b) "interested person" means any person who is or would be affected by an order made under this Act and includes

(i) the next of kin of the person in respect of whom an order is applied for or made,

(ii) a person who holds property of the person in respect of whom an order is applied for or made, and

(iii) the Public Trustee.

Order of presumption of death

- 3.(1) Where, upon the application of an interested person by originating notice of motion, the Court is satisfied that

(a) a person has been absent and not heard of or from by the applicant, or to the knowledge of the applicant by any other person, since a day named;

(b) the applicant has no reason to believe that the person is living; and

(c) reasonable grounds exist for supposing that the person is dead,

the Court may make an order declaring that the person shall be presumed to be dead for all purposes, or for such purposes only as are specified in the order.

Content of order

- (2) An order made under subsection (1) shall state the date on which the person is presumed to have died.

Amendment or revocation of order

(3) Any interested person may, with leave of the Court, apply to the Court for an order to vary, amend, confirm or revoke an order made under subsection (1).

Order as proof of death

(4) An order, or a certified copy thereof, declaring that a person shall be presumed to be dead for all purposes or for the purposes specified in the order is proof of death in all matters requiring proof of death for such purposes.

Effect of order on insurer

(5) No order issued pursuant to this Section shall be binding upon the insurer of the life of the person presumed to be dead until such time as a Court upon such notice and after such hearing as the Court may determine declares that the order applies to such insurer.

If personal representative believes person alive

4. Where an order has been made declaring that a person shall be presumed to be dead for all purposes or for the purpose of distributing his estate, and the personal representative of the person presumed to be dead believes or there are reasonable grounds for him to believe that the person is not in fact dead, the personal representative shall not thereafter deal with the estate or remaining estate unless the presumption of death is confirmed by an order made under subsection (3) of Section 3.

Distribution final

5.(1) Where a person who is presumed to be dead is in fact alive, any distribution of his property that has been made in reliance upon an order made under Section 3, and not in contravention of Section 4, shall be deemed to be a final distribution and to be the property of the person to whom it has been distributed as against the person presumed to be dead.

Undistributed property of person found alive

(2) Where a person who is presumed to be dead is found by the Court to be alive, the Court may, upon the application of any interested person, and subject to subsection (1), by order give such directions as the Court considers appropriate respecting the undistributed property of the person found to be alive and its preservation and return.

Distribution where person in fact dead

6. Where a person who is presumed to be dead is in fact found to be dead, any distribution of his property that has been made in reliance upon an order made under Section 3 shall be deemed to be a final distribution and to be the property of the person to whom it has

been distributed as against any person who would otherwise be entitled if the order made under Section 3 had not been made.

Appeal

7. Any interested person may appeal an order made under this Act to the Appeal Division of the Supreme Court of Nova Scotia.

Public Trustee

8. Where, pursuant to this Act, an application is made or an order appealed from, a copy of the documents on application or appeal and all other relevant documents pertaining to such application or appeal shall be served upon the Public Trustee and the Public Trustee shall be entitled to make representation to ensure that the interest and the property of the person in respect of whom the order is sought or the appeal made are protected.

Common law rights preserved

9. Nothing in this Act contained shall preclude a person who at common law could make an application for a presumption of death from making such an application and a Court from granting the same.

Part VIII of *Insurance Act*

10. Where there is any conflict between this Act and Part VIII of the *Insurance Act*, the provisions of this Act apply.

APPENDIX I – NEWFOUNDLAND AND LABRADOR'S PRESUMPTION OF DEATH ACT

Presumption of Death Act, R.S.N.L. 1990, c. P-20

An Act to Provide for the Making of Orders Declaring That Persons Named in the Orders are Presumed to be Dead

Short title

1. This Act may be cited as the *Presumption of Death Act*.

Definition

2. In this Act "court" means the Trial Division or a judge of that court.

Presumption of death

3.(1) Upon application to the court to be heard after the notice that the court thinks appropriate, the court, where satisfied that

- (a) a person has been absent and not heard of or from by the applicant, or to the knowledge of the applicant by another person, since a day named;
- (b) the applicant has no reason to believe that the person is living; and
- (c) reasonable grounds exist for supposing that the person is dead,

may make an order declaring that the person is presumed to be dead for all purposes or for those purposes only that are specified in the order.

- (2) An order made under subsection (1) shall state the date on which the person named is presumed to have died or the date after which that person is presumed not to be living.

Certified copy of order

4. An order made under subsection 3(1), or a certified copy of it, declaring that a person is presumed dead for all purposes or for the purposes specified in the order is proof of death in matters requiring proof of death.

Act subject to Life Insurance Act

5. This Act is subject to sections 40 to 45 of the *Life Insurance Act*.

APPENDIX J – YUKON TERRITORY'S *PRESUMPTION OF DEATH ACT*

Presumption of Death Act, R.S.Y. 2002, c. 174

Interpretation

1 In this Act, "interested person" means any person who is or would be affected by an order made under this Act and includes

- (a) the next of kin of the person in respect of whom an order is made or applied for; and
- (b) a person who holds property of the person in respect of whom an order is made or applied for.

Making of order

2.(1) If, on the application of an interested person, the Supreme Court is satisfied that

- (a) a person has been absent and not heard of or from by the applicant, or to the knowledge of the applicant, by any other person since a day named;
- (b) the applicant has no reason to believe that the person is living; and
- (c) a reasonable grounds exist for supposed that the person is dead,

the Supreme Court may make an order declaring that the person shall be presumed to be dead for all purposes, or for only those purposes specified in the order.

(2) An order made under subsection (1) shall state the date on which the person is presumed to have died.

(3) Any interested person may, with leave of the Supreme Court, apply to the Supreme Court for an order to vary, amend, confirm, or revoke an order made under subsection (1).

(4) An order, or a certified copy thereof, declaring that a person shall be presumed to be dead for all purposes or for the purposes specified in the order is proof of death in all matters requiring proof of death for those purposes.

Confirmation required for possibly mistaken order

3. If an order has been made declaring that person shall be presumed to be dead for all purposes or for the purpose of distributing their estate, and the personal representative of the person presumed to be dead believes or there are reasonable grounds for them to believe that the person is not in fact dead, the personal representative shall not thereafter deal with the estate or

remaining estate unless the presumption of death is confirmed by an order made under subsection 2(3).

Mistaken order

4.(1) If a person who is presumed to be dead is in fact alive, any distribution of their property that has been made in reliance on an order made under section 2, and not in contravention of section 3, shall be deemed to be a final distribution and to be the property of the person to whom it has been distributed as against the person presumed to be dead.

(2) If a person who is presumed to be dead is found by the Supreme Court to be alive, the Supreme Court may, on the application of any interested person and subject to subsection (1), by order give any directions the Supreme Court considers appropriate respecting the property of the person found to be alive and its preservation and return.

Person dead in fact

5. If a person who is presumed to be dead is in fact found to be dead, any distribution of their property that has been made in reliance on an order made under section 2 shall be deemed to be a final distribution and to be the property of the person to whom it has been distributed as against any person who would otherwise be entitled if the order made under section 2 had not been made.

Appeal

6. Any interested person may appeal an order made under this Act to the Court of Appeal.

APPENDIX K – NORTHWEST TERRITORIES' PRESUMPTION OF DEATH ACT

Presumption of Death Act, R.S.N.W.T. 1988, c. P-9

Definition of "interested person"

1. In this Act, "interested person" means a person who is or would be affected by an order made under this Act and includes

- (a) the next of kin of the person in respect of whom an order is made or applied for; and
- (b) a person who holds property of the person in respect of whom an order is made or applied for.

Order of presumption of death

2. (1) On the application of an interested person by originating notice of motion, the Supreme Court may make an order declaring that a person shall be presumed to be dead for all purposes or for the purposes specified in the order, where the Supreme Court is satisfied that

- (a) the person has been absent and has not been heard of or from by the applicant or, to the knowledge of the applicant, by any other person, since a day named;
- (b) the applicant has no reason to believe that the person is living; and
- (c) reasonable grounds exist for supposing that the person is dead.

Date of presumed death

(2) An order made under subsection (1) must state the date on which the person is presumed to have died.

Variation, confirmation or revocation of order

(3) An interested person may, with leave of the Supreme Court, apply to the Supreme Court for an order to vary, amend, confirm, or revoke an order made under subsection (1).

Proof of death

(4) An order, or a certified copy of an order, declaring that a person shall be presumed to be dead for all purposes or for the purposes specified in the order, is proof of death in all matters requiring proof of death for those purposes.

Duty of personal representative

3. Where

- (a) an order has been made declaring that a person shall be presumed to be dead for all purposes or for the purpose of distributing the estate of that person, and
- (b) the personal representative of the person presumed to be dead believes or there are reasonable grounds for the personal representative to believe that the person is not dead,

the personal representative shall not deal with the estate or remaining estate unless the presumption of death is confirmed by an order made under subsection 2(3).

Distribution of property where person alive

4 (1) Where a person presumed dead is alive, a distribution of his or her property that

- (a) was made in reliance on an order made under section 2, and
- (b) does not contravene section 3,

shall be deemed to be a final distribution.

Effect of distribution of property

- (2) Property distributed in accordance with subsection (1) shall be deemed to be the property of the person to whom it was distributed as against the person presumed dead.

Direction of Supreme Court

- (3) Where a person presumed dead is found by the Supreme Court to be alive, the Supreme Court may, on the application of an interested person and subject to subsections (1) and (2), by order give the directions that the Supreme Court considers appropriate respecting the property of the person presumed dead and its preservation and return.

Distribution of property where person dead

- 5 (1) Where a person presumed dead is found to be dead, a distribution of his or her property that was made in reliance on an order under section 2 shall be deemed to be a final distribution.

Effect of distribution of property

(2) The property referred to in subsection (1) shall be deemed to be the property of the person to whom it was distributed as against a person who would otherwise be entitled if the order made under section 2 had not been made.

Appeal

6. An interested person may appeal an order made under this Act to the Court of Appeal.

APPENDIX L – NUNAVUT'S *PRESUMPTION OF DEATH ACT*

Presumption of Death Act, R.S.N.W.T. 1988, c. P-9 (Nunavut)

Definition of "interested person"

1. In this Act, "interested person" means a person who is or would be affected by an order made under this Act and includes

- (a) the next of kin of the person in respect of whom an order is made or applied for; and
- (b) a person who holds property of the person in respect of whom an order is made or applied for.

Order of presumption of death

2. (1) On the application of an interested person by originating notice of motion, the Supreme Court may make an order declaring that a person shall be presumed to be dead for all purposes or for the purposes specified in that order, where the Supreme Court is satisfied that

- (a) the person has been absent and has not been heard of or from by the applicant or, to the knowledge of the applicant, by any other person, since a day named;
- (b) the applicant has no reason to believe that the person is living; and
- (c) reasonable grounds exist for supposing that the person is dead.

Date of presumed death

(2) An order made under subsection (1) must state the date on which the person is presumed to have died.

Variation, confirmation or revocation of order

(3) An interested person may, with leave of the Supreme Court, apply to the Supreme Court for an order to vary, amend, confirm, or revoke an order made under subsection (1).

Proof of death

(4) An order, or a certified copy of an order, declaring that a person shall be presumed to be dead for all purposes or for the purposes specified in the order, is proof of death in all matters requiring proof of death for those purposes.

Duty of personal representative

3. Where

- (a) an order has been made declaring that a person shall be presumed to be dead for all purposes or for the purpose of distributing the estate of that person, and
- (b) the personal representative of the person presumed to be dead believes or there are reasonable grounds for the personal representative to believe that the person is not dead,

the personal representative shall not deal with the estate or remaining estate unless the presumption of death is confirmed by an order made under subsection 2(3).

Distribution of property

4.(1) Where a person presumed dead is alive, a distribution of his or her property that

- (a) was made in reliance on an order made under section 2, and
- (b) does not contravene section 3

shall be deemed to be a final distribution.

Effect of distribution of property

- (2) Property distributed in accordance with subsection (1) shall be deemed to be the property of the person to whom it was distributed as against the person presumed dead.

Direction of Supreme Court

- (3) Where a person presumed dead is found by the Supreme Court to be alive, the Supreme Court may, on the application of an interested person and subject to subsections (1) and (2), by order give the directions that the Supreme Court considers appropriate respecting the property of the person presumed dead and its preservation and return.

Distribution of property where person dead

- 5.(1) Where a person presumed dead is found to be dead, a distribution of his or her property that was made in reliance on an order under section 2 shall be deemed to be a final distribution.

Effect of distribution of property

(2) The property referred to in subsection (1) shall be deemed to be the property of the person to whom it was distributed as against a person who would otherwise be entitled if the order made under section 2 had not been made.

Appeal

6. An interested person may appeal an order made under this Act to the Court of Appeal.

APPENDIX M – ARTICLES 92 TO 102 OF QUEBEC'S CIVIL CODE

Civil Code of Quebec, LRQ, c C-1991

Section II

Declaratory Judgment of Death

92. A declaratory judgment of death may be pronounced on the application of any interested person, including the Public Curator or the Minister of Revenue as provisional administrator of property, seven years after disappearance.

It may also be pronounced before that time where the death of a person domiciled in Québec or presumed to have died there may be held to be certain although it is impossible to draw up an attestation of death.

93. A declaratory judgment of death states the name and sex of the person presumed dead and, if known, the place and date of his or her birth and, if applicable, marriage or civil union, the name of the spouse, the names of his or her father and mother as well as his or her last domicile, and the date, time and place of death.

A copy of the judgment is transmitted without delay to the chief coroner by the clerk of the court that rendered the decision.

94. The date fixed as the date of death is either the date occurring on the expiry of seven years from disappearance, or an earlier date if the presumptions drawn from the circumstances allow the death of a person to be held to be certain at that date.

In the absence of other proof, the place fixed as the place of death is that where the person was last seen.

95. A declaratory judgment of death produces the same effects as death.

96. If the date of death is proved to precede that fixed by the declaratory judgment of death, the dissolution of the matrimonial or civil union regime is retroactive to the true date of death and the succession is open from that date.

If the date of death is proved to follow that fixed by the declaratory judgment of death, the dissolution of the matrimonial or civil union regime is retroactive to the date fixed by the judgment but the succession is open only from the true date of death.

Relations between the apparent heirs and the true heirs are governed by those rules contained in the Book on Obligations which concern the restitution of presentations.

Section III

Return

97. Where a person declared dead by a declaratory judgment of death returns, the effects of the judgment cease but the marriage or civil union remains dissolved.

However, if difficulties arise over custody of the children or support, they are settled as in the case of separation from bed and board or the dissolution of a civil union.

98. A person who has returned shall apply to the court for annulment of the declaratory judgment of death and rectification of the register of civil status. He may also, subject to the rights of third persons, apply to the court for the cancellation or rectification of the particulars or entries made following the declaratory judgment of death and nullified by his return, as if they had been made without right.

Any interested person may make the application to the court at the expense of the person who has returned if the latter fails to act.

99. A person who has returned recovers his property according to the rules contained in the Book of Obligations which concern the restitution or prestations. He reimburses the persons who, in good faith, were in possession of his property and who discharged his obligations otherwise than with his property.

100. Any payment made to the heirs or legatees by particular title of a person who has returned after a declaratory judgment of death but before the particulars or entries are cancelled or rectified is valid and constitutes a valid discharge.

101. An apparent heir who learns that the person declared dead is alive retains possession of the property and acquires the fruits and revenues thereof until the person who has returned applies to resume possession of his property.

Section IV

Proof of Death

102. Proof of death is established by an act of death, except in cases where the law authorized another mode of proof.

APPENDIX N – EXCERPTS FROM ALBERTA'S VITAL STATISTICS ACT, SURROGATE RULES, MARRIAGE ACT AND INSURANCE ACT

Vital Statistics Act, S.A. 2007, c. V-4.1

Registration of presumed death

37 The Registrar may, in the Registrar's discretion, register the death of a person who is presumed to have died in Alberta on receiving

- (a) a death registration document, and
- (b) one of the following:
 - (i) a decree of presumption of death made under section 21 of the *Marriage Act*,
 - (ii) a declaration of presumption of death made under section 593 of the *Insurance Act*, or
 - (iii) a declaration of death or presumed death made under section 94 of the Surrogate Rules (AR. 130/95).

Surrogate Rules, A.R. 130/95

Division 4 Proof of Death

Proof of Death

94(1) The court may permit a person to swear to the death of another person if there is no direct evidence of the death but there is evidence from which the death can be presumed.

- (a) In Forms C1 and C2, and
 - (b) Without notice or on the notice the court orders
- (3) The court may declare that the death of a person is proven or presumed if the court is satisfied with the evidence and the form of the evidence presented to the court.
- (4) A declaration of presumption of death made by the court must obtain particulars of the following information to the extent that those particulars have been established to the satisfaction of the court:
- (a) the full name of the person presumed dead, including the person's maiden or married name, where applicable;

- (b) the sex of the person presumed dead;
- (c) the place where the death is presumed to have occurred;
- (d) the date on which the death is presumed to have occurred.

Marriage Act, R.S.A. 2000, c M-5.

Petition for presumption of death

21(1) A married person who alleges that reasonable grounds exist for supposing that the other party to the marriage is dead may present an application to the Court of Queen's Bench to have it presumed that the other party is dead, and the Court, if satisfied that reasonable grounds exist, may make a degree of presumption of death.

(2) In any proceedings referred to in subsection (1), the fact that for a period of 7 years or more the other party to the marriage has been continually absent from the applicant and the applicant has no reason to believe that the other party has been living within that time is evidence that the other party is dead until the contrary is proved.

(3) A decree of presumption of death made by the Court of Queen's Bench under subsection (1) must contain particulars of the following information to the extent that those particulars have been established to the satisfaction of the Court:

- (a) the full name of the person presumed dead, including a maiden or married name where applicable;
- (b) the sex of the person presumed dead;
- (c) the place where death is presumed to have occurred;
- (d) the date on which the death is presumed to have occurred.

Insurance Act, R.S.A. 2000 c I-3

Declaration as to sufficiency of proof

679 If an insurer admits the validity of the insurance but does not admit the sufficiency of the evidence required by section 674 and there is no other question in issue except a question under section 680, the insurer or the claimant may, before or after action is brought and on at least 30 days' notice, apply to the Court for a declaration as to the sufficiency of the evidence furnished, and the Court may make the declaration or may direct what further evidence is to be furnished and on the furnishing of the evidence may make the declaration or, in special circumstances, may dispense with further evidence and make the declaration.

Declaration of presumption of death

680(1) If a claimant alleges that the person whose life is insured should be presumed to be dead by reason of the person not having been heard of for 7 years, and there is no other question in issue except a question under section 679, the insurer or the claimant may, before or after action is brought and on at least 30 days' notice, apply to the Court for a declaration as to presumption of the death, and the Court may make the declaration.

(2) A declaration of presumption of death made by the Court under subsection (1) must contain particulars of the following information to the extent that those particulars have been established to the satisfaction of the Court:

- (a) the full name of the person presumed dead, including a maiden or married name, where applicable;
- (b) the sex of the person presumed dead;
- (c) the date on which death is presumed to have occurred;
- (d) the place where death is presumed to have occurred;
- (e) whether the presumed death was accidental

Court order re payment of insurance money

681(1) On making a declaration under section 679 or 680, the Court may make an order respecting the payment of the insurance money and respecting costs that it considers just and a declaration or direction or an order made under this subsection is binding on the applicant and on all persons to whom notice of the application has been given.

(2) A payment made under an order made under subsection (1) discharges the insurer to the extent of the amount of the payment.

Order stays pending action

682 Unless the Court orders otherwise, an application made under section 679 or 680 operates as a stay of any pending action with respect to the insurance money.

Order re furnishing of further evidence

683 If the Court finds that the evidence furnished under section 674 is not sufficient or that a presumption of death is not established, it may order that the matters in issue be decided in an action brought or to be brought, or may make any other order it considers just respecting further evidence to be furnished by the claimant, publication of advertisements, further inquiry or any other matter, or respecting costs.

APPENDIX O – EXCERPTS FROM PRINCE EDWARD ISLAND'S MARRIAGE ACT, PROBATE ACT AND INSURANCE ACT

Marriage Act, R.S.P.E.I. 1988 c M-3

Presumption of Death

- 21 (1) A married person whose spouse is missing and who alleges
- (a) that his or her spouse has been continuously absent for at least seven years immediately preceding the application;
 - (b) that his or her spouse has not been heard from or heard of during such period by the applicant or to the knowledge of the applicant by any other person; and
 - (c) that the applicant has made reasonable inquiries and has no reason to believe that his or her spouse is living,

may apply to a judge of the Supreme Court for an order under this section.

Order declaring

- (2) Upon being satisfied as to the truth of the matters alleged, the judge may, in his discretion make an order declaring that the spouse shall be presumed dead.

Order to be deposited with application

- (3) Where an order has been obtained under this section, the person in whose favour the order was made, may, subject to this Act, obtain a license upon depositing a copy of the order with the person issuing the license together with the affidavit in the prescribed form.

Effect of order

- (4) Except for the purposes of subsection (3) the order has no effect.

Probate Act, R.S.P.E.I. 1988, c P-21

Contentious testamentary matters, hearing & adjudication on

- 38(1) The court may hear and adjudicate upon contentious testamentary matters, and nothing in this Act limits the right of any person named executor in a will from having it proved through witnesses or in solemn form of law, and such person may apply for a citation therefor notwithstanding the filing of a caveat under section 39.

Order for presumption of death

(2) Where a person has disappeared in circumstances leading to a belief that he has died by reason of disaster, accident, murder or suicide, on land, water or in the air, any person interested may apply at any time to the judge for an order of presumption of death of the missing person; and when in the opinion of the judge the evidence in support of the application so warrants, the judge may make such order accordingly.

Date of death, order stating

(3) The order may set forth the date on or about which the death is presumed to have occurred.

Insurance Act, R.S.P.E.I. 1988, c 1-4

Application for declaration of court

157. Where an insurer admits the validity of the insurance but does not admit the sufficiency of the evidence required by section 151 and there is no other question in issue except a question under section 158, the insurer or the claimant may, before or after action is brought and upon at least thirty days notice, apply to the court for a declaration as to the sufficiency of the evidence furnished, and the court may make the declaration or may direct what further evidence shall be furnished and on the furnishing thereof may make the declaration or, in special circumstances, may dispense with further evidence.

Application to court of declaration as to presumption of death

158. Where a claimant alleges that the person whose life is insured should be presumed to be dead by reason of his not having been heard of for seven years, and there is no other question in issue except a question under section 157, the insurer or the claimant may, before or after action is brought and upon at least thirty days notice, apply to the court for a declaration as to presumption of the death and the Court may make the declaration.

APPENDIX P – EXCERPTS FROM BRITISH COLUMBIA'S *INSURANCE ACT* AND ONTARIO'S *INSURANCE ACT*

Insurance Act, R.S.B.C. 2012, c. 1

Limitation of actions

76.(1) Subject to subsections (2) and (5), an action or proceeding against an insurer for the recovery of insurance money payable in the event of a person's death must be commenced not later than the earlier of

(a) 2 years after the date evidence is furnished under section 73, and

(b) 6 years after the date of the death.

(2) Subject to subsection (5), if a declaration has been made under the *Presumption of Death Act*, an action or proceeding referred to in subsection (1) must be commenced not later than 2 years after the date of the declaration.

(3) Subject to subsection (5), an action or proceeding against an insurer for the recovery of insurance money not referred to in subsection (1) must be commenced not later than 2 years after the date the claimant knew or ought to have known of the first instance of the loss or occurrence giving rise to the claim for insurance money.

(4) If insurance money is not payable unless a loss or occurrence continues for a period of time specified in the contract, the date of the first instance of the loss or occurrence for the purposes of subsection (3) is deemed to be the first day after the end of that period.

(5) An action or proceeding against an insurer for the recovery of insurance money payable on a periodic basis must be commenced not later than the later of

(a) the last day of the applicable period under subsection (1), (2), (3) or (4) for commencing an action or proceeding, and

(b) if insurance money was paid, 2 years after the date the next payment would have been payable had the insurer continued to make periodic payments.

Documents affecting right to insurance money

77.(1) Until an insurer receives at its head or principal office in Canada an instrument or an order of a court affecting the right to receive insurance money, or a notarial copy, or a copy verified by statutory declaration, of the instrument or order, it may make payment of the insurance money and is discharged to the extent of the amount paid as if there were no instrument or order.

- (2) Subsection (1) does not affect the rights or interests of any person other than the insurer.

Declaration as to sufficiency of proof

78. If an insurer admits the validity of the insurance but does not admit the sufficiency of the evidence required by section 73 and there is no other question in issue except a question under section 3 of the *Presumption of Death Act*, the insurer or the claimant may, before or after action is brought and on at least 30 days' notice, apply to the court for a declaration as to the sufficiency of the evidence furnished, and the court may make the declaration or may direct what further evidence must be furnished, and on it being furnished may make the declaration or, in special circumstances, may make the declaration or, in special circumstances, may dispense with further evidence.

Court may make order for payment

79.(1) On making a declaration under section 78 or an order under the *Presumption of Death Act*, the court may make an order respecting the payment of the insurance money and respecting costs it considers just, and a declaration or direction or order made under this subsection is binding on the applicant and on all persons to whom notice of the application has been given.

- (2) A payment made under an order under subsection (1) discharges the insurer to the extent of the amount paid.

Application to the court operates as stay of proceedings

80. Unless the court otherwise orders, an application made under section 78 or section 3 of the *Presumption of Death Act* operates as a stay of any pending action with respect to the insurance money.

Powers of court

81. If the court finds that the evidence furnished under section 73 is not sufficient or that a presumption of death is not established under the *Presumption of Death Act*, it may order that the matters in issue be decided in an action brought or to be brought, or may make such other order as it considers just respecting further evidence to be furnished by the claimant, publication of advertisements, further inquiry or any other matter or respecting costs.

Insurance Act, R.S.O. 1990, c. 1.8

Proceedings Under Contract

Proof of Claim

203.(1) Where an insurer receives sufficient evidence of,

- (a) the happening of the event upon which insurance money becomes payable;

- (b) the age of the person whose life is insured;
- (c) the right of the claimant to receive payment; and
- (d) the name and age of the beneficiary, if there is a beneficiary,

it shall, within thirty days after receiving the evidence, pay the insurance money to the person entitled thereto.

Order under *Declarations of Death Act*, 2002

(2) Despite sections 208 and 209, an order made under the *Declarations of Death Act*, 2002 that declares that an individual has died is sufficient evidence of death for the purpose of clause (1)(a) if the insurer had notice of the application.

Exception

(3) Subsection (2) does not apply if the order is limited, under subsection 2(6) of the *Declarations of Death Act*, 2002, to specified purposes other than the payment of insurance money.

Declaration as to sufficiency of proof

208. Where an insurer admits the validity of the insurance but does not admit the sufficiency of the evidence required by section 203 and there is no other question in issue except a question under section 209, the insurer or the claimant may, before or after action is brought and upon at least thirty days' notice, apply to the court for a declaration as to the sufficiency of the evidence furnished, and the court may make the declaration or may direct what further evidence shall be furnished and on the furnishing thereof may make the declaration or, in special circumstances, may dispense with further evidence.

Declaration as to presumption of death

209. Where a claimant alleges that the person whose life is insured should be presumed to be dead by reason or his or her not having been heard of for seven years and there is no other question in issue except a question under section 208, the insurer or the claimant may, before or after action is brought and upon at least thirty days notice, apply to the court for a declaration as to presumption of the death and the court may make the declaration.

t may make such order respecting the payment of the insurance money and respecting costs as it deems just and, subject to section 212, a declaration or direction or order made under this subsection is binding upon the applicant and upon all persons to whom notice of the application has been given.

APPENDIX Q – SECTION 83 OF MANITOBA'S *TRUSTEE ACT*

Trustee Act, C.C.S.M. c. T160

Validity of acts before revocation

83(1) Where the court has admitted a will to probate, or has appointed an administrator, notwithstanding that the grant of probate or the appointment may be subsequently revoked as having been erroneously made, all acts done under the authority of the probate, or appointment, including all payments made in good faith to or by the personal representative, are as valid and effectual as if it had been rightly granted or made; but upon revocation of the probate or appointment, in cases of an erroneous presumption of death, the supposed decedent, and in other cases the new personal representative may, subject to subsections (2) and (3), recover from the person who acted under the revoked grant or appointment any part of the estate remaining in his hands undistributed, and, subject to any statutory limitation, from any person who erroneously received any part of the estate as a devisee, legatee, or one of the next-of-kin, or as a spouse of the decedent or supposed decedent, the part so received or the value thereof.

Expenses allowed

83(2) The person acting under the revoked probate or appointment may retain out of any part of the estate remaining in his hands undistributed his proper costs and expenses incurred in the administration.

Fraud excepted

83(3) Nothing in this section protects any person acting as personal representative where he has been party or privy to any fraud whereby the grant or appointment has been obtained, or after he has become aware of any fact by reason of which revocation thereof is ordered unless, in the latter case, he acts in pursuance of a contract for valuable consideration and otherwise binding made before he became aware of the fact.

APPENDIX R – ONTARIO'S ABSENTEES ACT

The Absentees Act, R.S.O. 1990, c A.3

Definition

1. An absentee within the meaning of this Act means a person who, having had his or her usual place of residence or domicile in Ontario, has disappeared, whose whereabouts is unknown and as to whom there is no knowledge as to whether he or she is alive or dead.

Declaration by court

2. (1) The Superior Court of Justice may by order declare a person to be an absentee if it is shown that due and satisfactory inquiry has been made, or may direct such further inquiry to be made and proceedings to be taken as the court considers expedient before making any order.

Application, who may make

- (2) The application for the order may be made by,
- (a) the Attorney General;
 - (b) any one or more of the next of kin of the alleged absentee;
 - (c) the person to whom the alleged absentee is married;
 - (d) the person with whom the alleged absentee was living in a conjugal relationship outside marriage immediately before the absentee's disappearance;
 - (e) a creditor; or
 - (f) any other person.

Appeal

- (3) Any person aggrieved or affected by the order has the right to appeal therefrom.

Order declaring person no longer absentee

3. Upon application at any time, the court, if satisfied that such person has ceased to be an absentee, may make an order so declaring and superseding, vacating and setting aside the order declaring the person an absentee for all purposes except as to acts or things done in respect of the estate of the absentee while such order was in force.

Administration of estate

4. The court may make an order for the custody, due care and management of the property of an absentee, and a committee may be appointed for that purpose.

Who may be appointed committee

5. A trust corporation with or without one or more persons may be appointed such committee.

Powers and duties of court and committee

6. Where a committee of the estate of an absentee has been appointed, the powers and duties of the court and committee are the same, with necessary modifications, as the powers and duties of the court and of a guardian of property under the *Substitute Decisions Act, 1992*.

Powers of committee to expend money out of estate

7. The committee, subject to the direction of the court, has authority to expend moneys out of the estate of an absentee for the purpose of endeavouring to trace the absentee and in endeavouring to ascertain whether he or she is alive or dead.

Lands in Ontario of foreign absentee

8. Where a person who has had his or her usual place of residence or domicile out of Ontario and who has an interest in land in Ontario has been declared to be an absentee by a court of competent jurisdiction, the Superior Court of Justice may by order, upon being satisfied that the person has disappeared, that his or her whereabouts is unknown and that there is no knowledge as to whether the person is alive or dead, appoint a committee with such authority to manage, sell or otherwise deal with the interest in land as in the opinion of the court is in his or her best interests and those of his or her family..